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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF MISSOURI, *et al.*,
Petitioners,

vs.

KALIMA JENKINS, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

The questions presented in this petition arise from the ongoing litigation over school desegregation remedies ordered in the Kansas City Missouri School District, the scope of which this Court declined to review in *Missouri v. Jenkins*, ___ U.S. ___, 110 S. Ct. 1651 (1990). At this point, the cost of the remedies that have been ordered in this school district *will exceed $1.2 billion when fully implemented,* with no apparent end-point in sight.

The questions presented by this petition are the following:

1. Whether the district court's order, finding that the costs of asbestos abatement in the public schools of the Kansas City Missouri School District ("KCMSD") are proper "desegregation expenses" and requiring that the State of Missouri pay one-half of the costs of those activities and share liability for the entire cost of KCMSD's asbestos abatement pursuant to its declared joint and several liability with the KCMSD, exceeded the proper scope of a federal desegregation remedy required to address an intradistrict violation.

2. Whether the additional $8 million of budgeted construction costs for Central High School, a KCMSD magnet facility, is a proper "desegregation expense" of this intradistrict desegregation remedy, and whether the State can be ordered to pay a portion of the additional costs and ultimately share responsibility for the total costs through the joint and several liability doctrine declared in this case.

* A complete list of the parties to the proceeding is contained in the caption of the court of appeals. Pet. App. A-1.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The State of Missouri, and certain of its agencies and officials, petition for a writ of certiorari to review the accompanying judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 931 F.2d 470 and is reprinted at pages A-1 through A-42 of the accompanying appendix to this petition. The two orders of the district court that were affirmed in the court of appeals' decision presented for review are not reported and are set forth in the accompanying appendix at pages A-42 through A-58. Other unreported orders of the district court that are referred to in this petition are also

printed in the accompanying appendix at pages A-59 through A-66. Finally, the recent decision of the Eighth Circuit in *Jenkins v. Missouri*, Appeal No. 90-1234 (8th Cir. August 14, 1991), is set forth at pages A-67 through A-78.

JURISDICTION

The judgment of the court of appeals was entered on April 22, 1991. On July 16, 1991 Mr. Justice Blackmun granted an extension of time in which to file this petition until August 21, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The petition presents questions pertaining to the proper application of Section 1 of the Fourteenth Amendment, which provides in pertinent part: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV, § 1.

STATEMENT

This petition affords the Court a renewed opportunity to consider the scope of the ongoing school desegregation remedies ordered by the United States District Court for the Western District of Missouri for the Kansas City Missouri School District ("KCMSD or the "District"), which Justice Kennedy characterized in his concurring opinion in *Missouri v. Jenkins* as "a remedial order unlike any before seen" by the Court. 110 S. Ct. 1651, 1676 (1990) (Kennedy, J., concurring).[1]

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[1] This litigation was previously before the Court on two occasions. The first, involving questions pertaining to the award of attorneys' fees, was decided in *Missouri v. Jenkins*, 491 U.S. 274 (1989). The second case, where-

(Footnote 1 continued on next page)

1. *The Prior Proceedings.*

As an understanding of the particular issues presented herein requires some familiarity with the overall remedy that has been ordered and is being implemented in the KCMSD, its history will be reviewed briefly.

a. *The Rejection of Claims for Interdistrict Relief.*

The initial focus of this lawsuit — filed in 1977 by the KCMSD and certain KCMSD students — was on claims of interdistrict segregation, including a sweeping proposed remedy involving reassignment of students across district and state lines.[2] After the district court had realigned the KCMSD as a defendant in October 1978, *School District of Kansas City, Missouri v. State of Missouri*, 460 F. Supp. 421, 442 (W.D. Mo.

(Footnote 1 Continued)

in the Court considered the district court's authority to order an increase in local property taxes to assist in funding a portion of the desegregation remedy, is also styled *Missouri v. Jenkins* and is reported at 110 S. Ct. 1651 (1990). This Court's second *Jenkins* opinion will occasionally be referred to as "the *Jenkins* tax case" in this petition.

[2] Plaintiffs initially named the States of Missouri and Kansas and the United States Department of Housing and Urban Development ("HUD") as defendants, claiming that they and other defendants had "helped cause or had been part of a system of racial segregation among Kansas City metropolitan area school districts." *See Jenkins v. Missouri*, 807 F.2d 657, 661 (8th Cir. 1986) (*en banc*), *cert. denied*, 484 U.S. 816 (1987) (*Jenkins I*). The district court dismissed the action against the Kansas defendants for want of jurisdiction, *School District of Kansas City, Missouri v. State of Missouri*, 460 F. Supp. 421, 431-35 (W.D. Mo. 1978), *appeal dism'd*, 592 F.2d 493 (8th Cir. 1979), and realigned KCMSD as a defendant. *Id.* at 442. The plaintiffs then proceeded as representatives of the *Jenkins* class. The court later ruled that HUD was not liable and dismissed HUD as a defendant, *see Jenkins v. Missouri*, 593 F. Supp. 1485, 1506 (W.D. Mo. 1984), and that ruling was affirmed in *Jenkins I*. 807 F.2d at 681-82.

1978), *appeal dism'd*, 592 F.2d 493 (8th Cir. 1979), students in the KCMSD and in several other Missouri districts (the "Jenkins class") filed an amended complaint, adding claims of an intradistrict violation within the KCMSD, allegedly committed by the KCMSD and the State defendants. The KCMSD subsequently filed a cross-claim against the State, reiterating the claims of interdistrict violation and seeking indemnification against any intradistrict liability.

The district court rejected the claims for interdistrict relief, however. Applying the standards of *Milliken v. Bradley*, 418 U.S. 717 (1974) (*Milliken I*), the court entered extensive findings, demonstrating that the plaintiffs had proved neither an interdistrict violation nor an interdistrict effect. Additionally, the court determined that there had been no manipulation of district boundaries for racial reasons; that the pre-1954 State segregation policy had no significant current interdistrict effect; and that the pre-1948 State enforcement of racially-restrictive covenants likewise had no significant current interdistrict effects. HUD was found not to be liable and was dismissed as a defendant, as were the various suburban school district that had been named as defendants. The court of Appeals, sitting *en banc*, affirmed, noting the "specific findings that negate current significant interdistrict effects." *Jenkins v. Missouri*, 807 F.2d 657, 672 (8th Cir. 1986) (*en banc*), *cert. denied*, 484 U.S. 816 (1987) (*Jenkins I*).[3]

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[3] This court denied petitions for writs of *certiorari* filed by the plaintiffs and the KCMSD. 484 U.S. 816 (1987).

b. *The Intradistrict Claims and the Initial Remedial Order.*

Considering the plaintiffs' intradistrict claims, the court found that the State and the KCMSD had failed to eradicate all vestiges of the prior dual school system within the KCMSD.[4] The district court noted that some schools were racially isolated. *Jenkins v. Missouri*, 593 F. Supp. 1485, 1493 (W.D. Mo. 1984), *aff'd, Jenkins I, supra.* It also broadly asserted, without further detail, that the "inferior education indigenous of the state-compelled dual school system has lingering effects in the Kansas City, Missouri School District." *Id.* at 1492.

The district court then turned to the question of remedial relief. The remedy proposed by the KCMSD, which was accepted by the court in part, required no changes in student assignments or school attendance zones.[5] *Jenkins v. Missouri*, 639 F. Supp. 19, 25 (W.D. Mo. 1985), *aff'd, Jenkins I, supra.* Rather, it concentrated on providing substantial resources to the school district to

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[4] The district court's finding of State liability in 1984 rested on the fact that the Missouri Constitution previously included provisions requiring segregated education in the public schools. Although, as the court noted, the Missouri Attorney General issued an Opinion declaring those provisions unenforceable after this Court's *Brown I* decision and the related state statutes were later formally abrogated and the constitutional provisions formally rescinded, *see* 593 F. Supp. at 1490, the court held that the State had taken insufficient steps to dismantle the dual school system that existed as a result of its constitutional provisions and resulting state laws. *See generally id.* at 1501-05.

[5] In fact, the State proposed further student transfers with the objective of reducing the percentage of minority students where they represented a disproportionate share of the student body of a school in relation to the KCMSD enrollment as a whole. The plaintiffs and KCMSD opposed such measures, however, contending that further mandatory assignments might prompt white flight, 639 F. Supp. at 36, and that form of relief was never ordered.

upgrade the school system as a whole. *Id.* at 25. These programs included hiring additional personnel so that the District could achieve AAA status (the highest State rating for Missouri school districts) and employ more classroom teachers to lower pupil-teacher ratios; providing cash grants to all schools to improve educational achievement; and implementing a variety of other programs such as summer schools, full day kindergarten, tutoring, and early childhood development. *Id.* at 26-34. These programs were expected to cost approximately $50 million over the initial three years, and the State was required to pay approximately two-thirds of that amount. *Id.* at 43-44. The district court also ordered substantial improvements to the KCMSD capital facilities. *Id.* at 39-41. The State was ordered to bear $27 million of the $37 million cost, *id.* at 41, with more to follow. The court directed the KCMSD to review its facilities to identify any additional "capital improvements needed in order to bring its facilities to a point comparable with the facilities in neighboring suburban school districts." *Id.* The Eighth Circuit affirmed most of this initial remedial order in *Jenkins I*. *See* 807 F.2d at 658.[6]

c. ***The Magnet School Orders.***

The next major development in the evolution of this expansive remedy was the district court's Magnet Order, which posited a "long term goal" of "mak[ing] available to *all* KCMSD students educational opportunities equal to or greater than those presently available in the average Kansas City, Missouri metropolitan suburban school district" and placed renewed emphasis on its

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[6]As indicated above, the district court's initial rulings were consolidated and resolved in a single opinion in *Jenkins I*. The Eighth Circuit modified the district court's allocation of capital costs, requiring equal division. *Jenkins I*, 807 F.2d at 685. It did, however, later approve an allocation of 75% of the liability on the State, with joint and several liability, for program costs. *Jenkins v. Missouri*, 855 F.2d 1295, 1308, 1316 (8th Cir. 1988), *aff'd in part and rev'd in part*, 110 S. Ct. 1651 (1990) (*Jenkins II*).

earlier stated goal of attracting additional "non-minority enrollment" to the KCMSD. *See Missouri v. Jenkins*, 110 S. Ct. at 1668 (Kennedy, J., concurring) quoting *Jenkins II*, 855 F.2d at 1301-02. (emphasis in original) Under the Court's Magnet Order, *all* of the District's high schools and middle schools were ordered converted to magnet facilities, each with a distinctive theme or emphasis, and some 67% of the District's elementary schools have become magnet schools as well.[7] Further capital improvements were ordered, and the District Court for the first time ordered that local property taxes be raised to assist the KCMSD in raising its share of the costs of this ever-increasing and costly remedy.

The State's resulting petition for *certiorari* presented questions pertaining to the permissible scope of the remedy and the Court's authority to order an increase in State taxes to assist in its funding. The Court, however, declined to consider the question pertaining to the scope of the remedy, and later it affirmed the district court's power to authorize the levying of taxes in support of the desegregation remedies it had ordered. *Jenkins*, 110 S. Ct. at 1664; *id.* at 1677 (Kennedy, J., concurring). Nonetheless, the concurring Justices in *Jenkins* expressed serious reservations concerning the District's desegregation plan and its goals. Reviewing some of the more unusual aspects of the

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[7] Justice Kennedy noted that the initial KCMSD plan called for conversion of approximately one-half of the District's elementary schools to magnets by the 1991-92 school year. *See* 110 S. Ct. at 1668 (Kennedy, J., concurring). The scope of the magnet system has been expanded, however. Currently, some 67% of the District's elementary schools are, or are planned to become, magnet facilities.

remedies ordered for the KCMSD,[8] Justice Kennedy noted that a member of the Eighth Circuit had characterized the remedy as "go[ing] far beyond anything previously seen in a school desegregation case," 110 S. Ct. at 1668 (Kennedy, J., concurring) quoting *Jenkins II*, 855 F.2d at 1318 (Bowman, J., dissenting from denial of *reh. in banc*), and observed that this Court "has never approved a remedy of the type adopted by the District Court" and that "[t]here are strong arguments against the validity of such a plan." 110 S. Ct. at 1676 (Kennedy, J., concurring).

d. *A Summary of the Current State of the Remedies in the* KCMSD.

Presently, the District is implementing and attempting to expand the massive ongoing remedies that have been ordered. This entails the district court's annual review of budgets for various educational programs that are funded through the remedial orders and continued litigation arising from issues presented

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[8] Some of the various aspects of the KCMSD remedy that Justice Kennedy considered illustrative of why the remedy was proving so costly were the following, which have been ordered as part of the capital improvements and magnet remedies: a performing arts middle school; a technical magnet high school offering programs ranging from heating and air conditioning to cosmetology and robotics; a 25 acre farm and 25 acre "wildlife area" for science study, which is to include an air-conditioned meeting room to accommodate 104 persons; air conditioning in all classrooms in high schools and 15 microcomputers; a 2,000-square-foot planetarium; greenhouses and vivariums; a model United Nations assembly area wired for language translations; broadcast-capable radio and television studios with an editing and animation lab; a temperature-controlled art gallery; movie editing and screening rooms; a 3,500-square-foot dust-free diesel mechanics room; 1,875-square-foot elementary school animal rooms for use in a Zoo Project; swimming pools; and numerous other facilities. 110 S. Ct. at 1668, 1676-77 (Kennedy, J., concurring) (citations omitted). As Justice Kennedy observed, "[i]t comes as no surprise that the cost of this approach to the remedy far exceeded KCMSD's budget, or for that matter, its authority to tax." *Id.*

by the KCMSD's attempts to implement and expand the remedies. The issues presented for review in this instance arise from that continuing pattern of litigation and district court supervision.

At this juncture of the remedy, the district court has ordered desegregation remedies that *will cost some $1.2 billion to implement*, and the State of Missouri *has actually paid approximately $469 million* in support of its ordered-share and portions of the KCMSD's ordered-share that the District itself has refused to implement a tax levy increase to fund.[9] This, of course, is in addition to the State contributions to the cost of KCMSD's educational program, which are provided pursuant to State laws providing for the allocation of certain specified tax revenues to school districts throughout the State of Missouri in accordance with applicable formulae.

Although the *Jenkins* tax case recognized the district court's power to authorize raising the level of local property taxes in support of KCMSD's obligation for its share of remedial costs, KCMSD has opposed increases in the tax levy to the level

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[9] As of the time the orders considered in the *Jenkins* tax case were entered, the remedies had grown to a level of some $260 million in capital improvements and a magnet-school plan costing over $200 million. *See* 110 S. Ct. at 1668 (Kennedy, J., concurring) citing *Missouri v. Jenkins*, 491 U.S. at 276. Currently, the orders for capital improvements (portions of which have not yet been implemented) call for expenditures of approximately $505 million. The ordered programmatic remedies and other desegregation-related expenditures, such as transportations costs, are now at a level of some $707 million.

The State's actual payments of $469 million consists of payments of some $402 million for desegregation remedies for which the State has been deemed to have the primary payment obligation. In addition, the State has been ordered to pay some $67 million (net of amounts paid and then reimbursed by KCMSD) to cover a portion of the KCMSD's primary liability, which the KCMSD itself has refused to implement a tax levy increase to pay in spite of the taxing authority recognized in this Court's *Jenkins* tax case.

required to fund *all* of its share, and the district court has declined to order KCMSD to raise taxes to those levels. As a result, the State has also been called upon to fund a portion of KCMSD's share of the costs of the remedies pursuant to the concept of joint and several liability. *See* note 9, *supra*. That issue is presently before in the Eighth Circuit. *Jenkins v. Missouri*, Appeal No. 91-1938-WMKC (1991).

2. *The Orders Presented for Review.*

This petition presents for review two issues that arose and were considered in the Eighth Circuit's fourth decision addressing the remedies in this extended litigation. *Jenkins v. Missouri*, 931 F.2d 470 (8th Cir. 1991). Specifically, the State seeks review of an order concerning the propriety of including as a part of the desegregation remedy the costs of abating asbestos substances contained throughout the school buildings of the KCMSD and the Court's order that the State fund one-half of the estimated costs of that asbestos abatement activity. Also presented for review is a separate district court order approving an increase in the construction budget of $8,231,565 for Central High School, a new magnet facility that has been designed and built to offer an extraordinary range of athletic facilities in the hope of attracting additional urban and suburban non-minority enrollments into the KCMSD, rasing the total budget for constructing and equipping that one facility from the $15,243,050 initially approved and ordered to a revised level of $23,474,615.[10] Both orders were affirmed by the Eighth Circuit in a single opinion considering these and other issues.

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[10] The total cost of Central High School, when recognition is given to the costs of site acquisition and preparation and an increase in the equipment budget, will be approximately $32 million. *Cf.* Pet. App. at A-43.

a. *Asbestos Abatement Costs.*

As the Eighth Circuit noted, the district court's original capital improvements order included some costs for asbestos abatement that were not specifically challenged in the State's earlier appeals. Pet. App. at A-26. In subsequent proceedings leading to the instant petition, however, the KCMSD sought an order authorizing additional funding of some $900,000 for asbestos abatement for six specific schools and seeking to impose 100% of that liability on the State. Pet. App. at A-23. In addition, KCMSD sought an order authorizing it to proceed with asbestos abatement for an entire phase of future renovations (referred to as the "Phase III" renovations), and directing that those costs be shared by the State. Finally, the KCMSD urged that the district court establish guidelines for asbestos abatement for its remaining capital improvements in accordance with the Asbestos Hazard Emergency Response Act ("AHERA"), 15 U.S.C. §§ 2461 *et seq.* (1988).

With the exception of the KCMSD's proposed allocation of responsibility for funding the asbestos removal activities, the district court granted the District all of the relief it had sought. The court concluded that asbestos removal costs were a proper "desegregation expense" and ordered that the State and the KCMSD share equally in that cost, subject to the joint and several liability rule that it has imposed in the case. The court further granted the KCMSD request that the federal standards set forth in AHERA would serve as the guidelines for the asbestos abatement program during the remaining capital improvements activities in the KCMSD.

In affirming, the Eighth Circuit noted that the State had reiterated on appeal the same arguments that the district court had rejected. The State maintained, for example, that the presence of asbestos in the Kansas City public school system was not caused by illegal segregation in the KCMSD, nor was that condition a "vestige of segregation" for which the State could be

held jointly and severally liable in a desegregation remedy. The State had further urged that asbestos abatement was a problem throughout Missouri and in schools throughout the nation, and noted that the evidence did not suggest that KCMSD's asbestos problem was present in the formerly all-black schools and absent in the formerly all-white ones, as one would expect if this condition were a result of prior efforts at segregation. Pet. App. at A-24. The court of appeals then proceeded to endorse the district court's findings rejecting those arguments.

As the Eighth Circuit noted, the district court's order requiring the State to share in the costs of asbestos abatement throughout the KCMSD was based on its previous findings, which the court of appeals had approved earlier. The Eighth Circuit quoted those findings with renewed approval in sustaining the asbestos order. Pet. App. at A-24. The court of appeals quoted approvingly, for example, the district court's finding that " '[t]he improvement of school facilities is an important factor in the overall success of this desegregation plan,' " and that health and safety hazards were an obstacle both to "education as well as to maintaining and attracting non-minority enrollment." Pet. App. A-24 quoting Pet. App. at A-56. The Eighth Circuit further noted with approval that the district court had acknowledged the court of appeals' conclusion that capital improvements are " 'necessary for successful desegregation' " and are " 'required both to improve the education available to the victims of segregation as well as to attract whites to the schools.' " Pet. App. at A-24 quoting Pet. App. at A-56 (citations omitted). Additionally, the court of appeals contributed one further justification for the asbestos order that had not been specifically advanced by the district court itself. The Eighth Circuit noted that it had previously found that both the State and the KCMSD had "caused the decay" of the facilities, thus necessitating their later renovation. Pet. App. at A-24 - A-25, citing and quoting *Jenkins II*, 855 F.2d at 1300 and *Jenkins v. Missouri*, 672 F. Supp. 400, 411 (W.D.

Mo. 1987), *aff'd in part and rev'd in part*, 855 F.2d 1295 (8th Cir. 1988). Citing the evidence in the district court that some of the court-ordered renovations had activated asbestos substances that normally would have remained dormant and thus posed no hazard, the court of appeals considered that fact to present a set of "unique circumstances" that properly allowed the district court to conclude that asbestos abatement costs are a "proper desegregation expense" and to require that the State assume a portion of the cost and share joint and several liability for it as well. Pet. App. at A-25. The court of appeals determined that it "cannot conclude that the district court's characterization of asbestos abatement costs as a desegregation expense is clearly erroneous." Pet. App. At A-26.

b. ***The Central Order.***

Central High School was approved in the district court's Magnet Order as a magnet facility that would focus on what was termed a "Classical Greek" curriculum, and would offer a separate computer science theme. Much of the "Classical Greek" focus is to be athletic in nature. Thus, in order to make the facility attractive, it was initially designed to include a vast array of specialized athletic facilities, including an Olympic size (50 meter) swimming pool with high dive platform and other diving facilities and seating to accommodate 400 spectators; indoor and outdoor running tracks; separate gymnasium facilities for basketball and similar sports activities and for gymnastics and wrestling activities; tennis and racquetball courts; and separate fields for various outdoor sports activities. *Cf.* Pet. App. at A-45. The district court's Magnet Order budgeted $15,243,050 for the construction and equipping of Central, Pet. App. at A-30, which the court of appeals approved in *Jenkins II* as part of its general affirmance of the Magnet Order which this Court declined to review.

The KCMSD then proceeded to exceed even this generous budget, prompting it to seek an amendment increasing the construction budget by more than $8 million, with the result that the facility would be budgeted to cost more than $23 million to construct and furnish, and some $32 million in total, when site acquisition and other costs are considered. The State challenged the KCMSD motion, contending that the initial budget was more than sufficient and that the District had made no attempt to build a facility consistent with that generous budget.

Following an evidentiary hearing, the district court rejected virtually all of the State's challenges. Although it deleted the high diving platform component of the swimming facility from the desegregation budget in response to safety concerns, Pet. App. at A-46; *see* note 13, *infra*, the remainder of the budget increase was sustained. The district court's basic findings, which were again cited approvingly by the Eighth Circuit and adopted as a portion of its own rationale, included the following:

> 1) "that the location of Central in the predominantly black central corridor area of Kansas City made its desegregation a challenge";
>
> 2) that alterations in and additions to the planned athletic facilities has caused the final budgeted figures to exceed the initial budget estimates;
>
> 3) "that the planned Central facilities are more extensive than any other high school in the Kansas City area and that *such facilities are necessary to attract non-minority suburban students to the inner city*"

Pet. App. at A-30, A-34 (emphasis added).

As the court of appeals noted, the State maintained that KCMSD had unjustifiably expanded the plans for Central after the district court's initial approved budget and challenged the district court's purported findings as "policy judgments" that

should be subjected to *de novo* appellate review rather than treated with the level of deference normally accorded a trial court's findings of fact. Pet. App. at A-34. The Eighth Circuit rejected the State's proposed standard of review, however, as "wholly unpersuasive" and proceeded to apply the clearly erroneous standard in reviewing the matter. Pet. App. at A-34. Furthermore, in affirming the district court's ruling, the court of appeals endorsed and emphasized its conclusion that a facility of the kind that was contemplated by the amended budget may be necessary to attract non-minority enrollments to that particular location:

> The [district] court's analysis *particularly focused on the attractiveness of Central's facilities to non-minority students*. The district court cited the removal of certain athletic, art and music facilities from Central's design plans and the efforts of the project management team to live within the original budget as factors indicating KCMSD's efforts to reduce Central's cost. The district court also pointed out that even a witness for the State conceded that the Central High concept was outstanding *and could help achieve desegregation in the KCMSD*.

Pet. App. at A-33 (emphasis added and citations omitted). The Eighth Circuit thus sustained the district court's order expanding the Central budget, and that facility is now being constructed at a total cost in excess of $32 million.

REASONS FOR GRANTING THE WRIT

The grant of certiorari in this case would allow this Court to establish clearly that the permissible scope of a court-ordered desegregation remedy is to be determined by reference to the factors identified in *Green v. New Kent County School Board*, 391 U.S. 430 (1968), and reiterated last Term in *Board of Education of Oklahoma City Public Schools v. Dowell*, ___ U.S. ___, 111 S. Ct. 630 (1991), and to specify that the federal courts' mandate to determine whether the vestiges of *de jure* segregation had been eliminated "as far as practicable", *Dowell*, 111 S. Ct. at 638, is to be defined by those same *Green* factors.[11] As the instant petition demonstrates, this further clarification is necessary and appropriate to assure that the Court's recent admonition in *Dowell* that federal supervision of local school systems was intended to be a "temporary measure to remedy past discrimination," 111 S. Ct. at 637, is properly honored by the lower federal courts.

In *Milliken v. Bradley*, 433 U.S. 267 (1977) (*Milliken II*), this Court articulated the general requirements that desegregation remedies must meet:

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[11] As the Court instructed in *Dowell*, 111 S. Ct. at 638,

> In considering whether the vestiges of *de jure* segregation had been eliminated as far as practicable, the District Court should look not only at student assignments, but "to every facet of school operations — faculty, staff, transportation, extracurricular activities and facilities." *Green*, 391 U.S. at 435. *See also Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1, 18 (1971) ("[E]xisting policy and practice with regard to faculty, staff, transportation, extracurricular activities and facilities" are "among the most important indicia of a segregated system.")

> [T]he nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation. The remedy must therefore be related to "the *condition* alleged to offend the Constitution. . . ." Second, the degree must indeed be *remedial* in nature, that is, it must be designed as nearly as possible "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." Third, the federal courts . . . must take into account the interest of state and local authorities in managing their own affairs, consistent with the Constitution.

433 U.S. at 280-81 (emphasis in original and citations omitted) *Milliken II* also approved certain limited remedial and compensatory measures that were to be offered to the individual victims of discrimination while the school system was effecting a transition to a condition of constitutional compliance.[12] *Milliken II* did not, however, grant the federal courts free license to identify and address every perceived deficiency in a school system that was undergoing a desegregation remedy. This, we submit, is confirmed by the Court's recent admonitions in *Dowell* that the federal court's supervisions of school systems was intended "as a temporary measure" and that the federal courts' desegregation decrees, unlike those entered in some other areas, "are not intended to operate in perpetuity." 111 S. Ct. at 637. *See also Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1, 22

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[12] Courts commonly have described the goal of desegregation remedies as eliminating the "dual" school system and replacing it with a "unitary" one. *Cf. Dowell*, 111 S. Ct. at 635-36 (noting that the lower courts had sometimes used the term "unitary status" in inconsistent and confusing manners and instructing that the constitutional command that was at issue was the mandate of the Fourteen Amendment that "No State shall . . . deny to any person . . . the equal protection of laws").

(1971) ("The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities. One vehicle can carry only a limited amount of baggage.")

As this Court made clear in *Milliken I*, a school district can satisfy the commands of the Fourteenth Amendment and still have largely-minority schools. Indeed, they will necessarily have largely minority schools when the student population of the district as a whole is predominantly minority. 418 U.S. 717, 747, n.22 citing *Green v. New Kent County School Board, supra; Wright v. Council of the City of Emporia*, 407 U.S. 451 (1972);*United States v. Scotland Neck City Bd. of Educ.*, 407 U.S. 484 (1972). Thus, *Milliken II* expressly rejected the suggestion that "the Constitution is . . . violated by racial imbalance in the schools, without more," 433 U.S. at 280, n.14, and a number of courts have recognized that primarily-minority school districts can achieve unitary status without attracting additional non-minority students to change their overall racial composition. *See Castenada v. Pickerd*, 781 F.2d 456, 461 (5th Cir. 1986); *Calhoun v. Cook*, 522 F.2d 717, 719 (5th Cir. 1975); *Bradley v. Baliles*, 639 F. Supp. 680, 685 (E.D. Va. 1986), *aff'd*, 829 F.2d 1308 (4th Cir. 1987).

By establishing as a primary remedial objective the goal of attracting additional non-minority enrollments to the school system, the lower courts in *Jenkins* have defined this intradistrict remedy in terms that exceed the constitutional mandate. Equally important, by positing the attraction of additional non-minority students as a justifying rationale for measuring the permissible scope of the remedies that can be ordered, these courts have adopted a standard that is virtually limitless in its ability to accommodate the desire for greater remedial measures. Virtually any potential improvement in a school system can fairly be said to offer the promise of attracting additional non-minority

enrollments.[13] Indeed, as the Eighth Circuit's affirmance of the district court's Central order demonstrates, the more difficult the undertaking, the most costly it can become.[14] And finally, by embracing this essentially open-ended rationale in a case in which the school district proposes remedies that are to be

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[13] This point is illustrated by the district court's analysis of the evidence introduced at the hearings it conducted to consider KCMSD's requested budget increases for Central. Repeatedly, the district court credited as virtually dispositive the opinion testimony of various witnesses expressing the view that a challenged feature would be "attractive" to suburban, non-minority students that KCMSD hoped to encourage to attend Central. *See, e.g.* Pet. App. at A-45 (one KCMSD witness testifying that "[a]lthough he agreed that swimming can be taught in a pool less than 50 meters . . . a 50 meter pool would be more attractive to suburban, non-minority students"). After reciting that testimony and similar testimony of other witnesses, the district court concluded "that the desegregative attractiveness of the 50 meter pool justifies its inclusion in the Central design." Pet. App. at A-46.

The district court addressed the 10 meter diving platform in similar terms, but concluded that, in view of the testimony expressing concern for safety and liability issues presented by such a platform, "[t]he Court is not convinced that the desegregative attractiveness of the 10 meter diving platform outweighs the dangers and costs of construction and liability insurance associated with the platform." The district court therefore refused to fund the 10 meter platform as a part of the desegregation remedy, although it indicated that the KCMSD could include the diving platform if it chose to bear the entire cost itself. Pet. App. at A-46.

[14] The district court opened its Central opinion with the following observation:

> Central High School is virtually an all black school located in the central corridor area of Kansas City where the residential population is substantially all black. Therefore, the desegregation of Central is a challenge.

Pet. App. at A-42. As noted above, the court placed great weight on the opinion testimony of witnesses expressing the view that certain athletic features of the Central facility would be "desegregatively attractive," especially to suburban non-minority students. Pet. App. at A-44 through A-48. Similarly, the district court dismissed the testimony of one of the State's witnesses noting the extravagance of certain elements of the Central design

(Footnote 14 continued next page)

substantially funded by the State, the courts in this case have embarked on a remedy that is potentially endless in nature and scope.[15]

(Footnote 14 Continued)

in relation to other school buildings by noting that other buildings did not face the same desegregation challenges. Pet. App. at A-48. The court concluded,

> Although the Central design is more extensive than any other high school in the Kansas City area, such facilities are necessary to attract non-minority suburban students to the inner city to accomplish the difficult task of desegregating Central High School

Pet. App. at A-49.

[15] As this Court has noted, a school board undergoing a desegregation remedy "is entitled to a rather precise statement of its obligations under a desegregation decree." *Dowell*, 111 S. Ct. at 636, citing *Pasadena City Bd. of Education v. Spangler*, 427 U.S. 424 (1976). The same is certainly true of a state defendant that is called upon to make massive financial contributions to a remedy of this kind. By adopting such ill-defined objectives for the remedy as eliminating the "vestiges of segregation" or attracting additional non-minority enrollments into the school system, the lower courts in this case have embarked on a remedy that lacks ascertainable standards or an identifiable ending point.

While the ill-defined nature of this remedy's objectives makes it virtually impossible to know when or how the parties' remedial obligations might be satisfied in this case, the most recent decision of the court of appeals, which was issued while this petition was being finalized, suggests that the Eighth Circuit believes that this billion dollar desegregation remedy will continue for an extended period of time. While reconfirming that an essential goal of this remedy is to attract non-minority students into the school district, *see Jenkins v. Missouri*, No. 90-2314 (8th Cir. August 14, 1991) slip op. at 9, Pet. App. at 75, that court expressed dissatisfaction with the pace of progress in attaining that objective. According to the Eighth Circuit, "at this point, KCMSD has only begun its vast efforts to remedy the vestiges of the dual system of education in this district." *Id.* at 7; Pet. App. at 73. While maintaining that the record indicated that some progress had been made, the court of appeals noted that the task of increasing non-minority enrollments in the KCMSD had been "excruciatingly slow." *Id.*

The lower courts' treatment of Central thus illustrates the virtually limitless rationale that has driven this desegregation remedy, and that created the requirement that the district court exercise the taxing powers granted by the laws of the State of Missouri to assist in funding the KCMSD's portion of the remedy.[16] As the concurring Justices noted in the *Jenkins* tax case, it "cannot be contended that interdistrict comparability, which was the ultimate goal of the district court's orders, is itself a constitutional command." 110 S. Ct. at 1676. In this instance, the District Court's goals for the $32 million Central High School facility exceed even the standard of interdistrict comparability, however, responding instead to the goal of "desegregative attractiveness" for the attraction of suburban non-minority students into an inner-city school. Neither goal is required by the command of the Equal Protection Clause of the Fourteenth Amendment, and neither can properly be relied on as the driving force for a remedy that so plainly exceeds the objectives of a legitimate desegregation remedy set forth in *Dowell* and *Green*.

The lower courts' treatment of the question of asbestos funding suffers from similar infirmities. Again, by defining a central goal of this remedy in terms that substantially exceed the mandate of the Fourteenth Amendment, the lower courts have established a benchmark that accommodates virtually any improvement in the school system that might be advanced. Virtually any enhancement to the schools can be said to be "an

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[16] Justice Kennedy noted that the KCMSD and the plaintiffs have maintained a " 'friendly adversary' " relationship, with the District proposing evermore expensive capital improvements programs with the agreement of the plaintiffs and over the State's objection. 110 S. Ct. at 1667 (Kennedy, J., concurring). In the process, "the KCMSD had demonstrated little concern for the fiscal consequences of the remedy that it helped design," *id.*, which inevitably forced the district court to exercise its authority to authorize increasing the level of local property tax to support the KCMSD's portion of the remedy. *Id.* at 1667.

important factor in the success of [a] desegregation plan" or conducive to "maintaining and attracting non-minority enrollment." Pet. App. at A-24.

The record in this case provides no suggestion that the existence of asbestos in the public schools of the KCMSD is in any way the product of prior segregation. Moreover, the Eighth Circuit's citation to prior statements concerning the State's purported contribution to the prior decay of the school facilities in the KCMSD as a "vestige of segregation," Pet. App. at A-25, citing *Jenkins II*, 855 F.2d at 1300 and *Jenkins*, 672 F. Supp. at 411, refers to nothing more than the fact that for many years the voters of the KCMSD and its school administration failed to provide necessary funds and attention to the maintenance of the public school facilities — a reality that the concurring Justices in the *Jenkins* tax case recognized as a political problem rather than one that federal courts are empowers to address through the Fourteenth Amendment.[17] The district court's adoption of the federal standards embodied in the AHERA statute as the standard for asbestos abatement to be required and funded as part of this desegregation remedy illustrates the all-encompassing nature of the remedy itself. AHERA was enacted to assure a prompt response to the potential hazards posed by asbestos substances in *all* schools, public and private, and the Act and the

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[17] As Justice Kennedy noted:

> District Courts can and must take needed steps to eliminate racial discrimination and ensure the operation of unitary school systems. *But it is discrimination, not the ineptitude of educators or the indifference of the public, that is the evil to be remedied.* An initial finding of discrimination cannot be used as the basis for a wholesale shift of authority over day-to-day school operations from parents, teachers, and elected officials to an unaccountable district judge whose province is law, not education.

Jenkins, 110 S. Ct. at 1676 (Kennedy, J., concurring) (emphasis added).

regulations it engendered impose the duty of compliance on "local education agenc[ies]," a term that does not encompass states. *See* 15 U.S.C. § 2642(7) and 40 C.F.R. § 763.83. In this case, however, the expansive nature of the desegregation remedy allows the lower courts, under the guise of enforcing a desegregation remedy, to require the State of Missouri to share in the funding of a generalized obligation that Congress has imposed by statute on local education agencies.

Finally, even though the *Jenkins* remedy may be unlike any previously seen by this Court, 110 S. Ct. at 1676 (Kennedy, J., concurring), the uniqueness of this remedy does not suggest that the expansive rationale on which it is based does not merit the Court's review. The remedies ordered in *Jenkins* are so far astray from this Court's desegregation jurisprudence to warrant review on that basis alone. Equally important, the dynamics that give rise to remedies of this kind are no longer unusual. A little more than a decade earlier, Justice Powell considered the sight of a school board joining with the plaintiffs to sue a State in a desegregation case "unique", and noted that the school board in that case apparently had decided to sacrifice its normal autonomy in order to gain access to State funds for remedial purposes. *See Milliken II*, 433 U.S. at 293 (Powell, J., concurring). This situation no longer is unique. In addition to this case, where Justice Kennedy noted that Justice Powell's observations appeared applicable, *see* 110 S. Ct. at 1676 (Kennedy, J., concurring), the State of Missouri is a defendant in the ongoing desegregation case concerning the St. Louis public school system. *See, e.g., Liddell v. Missouri*, 731 F.2d 1294 (8th Cir.), *cert. denied*, 469 U.S. 816 (1984) (*Liddell VII*); *Liddell v. Board of Educ.*, 907 F.2d 823 (8th Cir. 1990) (*Liddell XIX*). States have also been named in other desegregation cases as well. *See e.g., Little Rock School Dist. v. Pulaski County Special School Dist.*, 839 F.2d 1296 (8th Cir.), *cert. denied*, 488 U.S. 869 (1988); *School Bd. of the City of Richmond v. Baliles*, 829 F.2d 1308 (4th

Cir. 1987); *Kelley v. Board of Educ. of Nashville*, 836 F.2d 986 (6th Cir. 1987); *Board of School Directors v. State of Wisconsin*, 649 F. Supp. 82 (W.D. Wis. 1985). The resulting change in the practical alignment of interests of the school boards — which as nominal defendants can be expected to operate as "friendly adversaries" to urge that remedies be ordered "against" them to gain access to state treasuries — will continue in the coming years. And in the absence of further guidance from this Court clarifying that federal school desegregation remedies cannot be expanded substantially beyond the parameters of the *Green* factors for the purpose of addressing vague and ill-defined "vestiges of segregation" that are not remedied by addressing the *Green* factors themselves, the intrusion of "unaccountable district judge[s] whose province is law, not education," 110 S. Ct. 1676 (Kennedy, J., concurring) will proliferate.

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

United States Court of Appeals
for the Eighth Circuit

No. 89-1253

Kalima Jenkins, by her friend, Kamau Agyei; Carolyn Dawson, by her next friend, Richard Dawson; Tufanza A. Byrd, by her next friend, Teresa Byrd; Derek A. Dydell, by his next friend, Maurice Dydell; Terrance Cason, by his next friend, Antoria Cason; Jonathan Wiggins, by his next friend, Rosemary Jacobs Love; Kirk Allan Ward, by his next friend, Mary Ward; Robert M. Hall, by his next friend, Denise Hall; Dwayne A. Turrentine, Turrentine, by his next friend, Sheila Turrentine; Gregory A. Pugh, by his next friend, David Winters, on behalf of themselves and all others similarly situated;

Appellees,

American Federation of Teachers, Local 691,

v.

The State of Missouri; Honorable John Ashcroft, Governor of the State of Missouri;

Appellants,

Wendell Bailey, Treasurer of the State of Missouri;

Missouri State Board of Education
Roseann Bentley
Dan Blackwell
Terry A. Bond, President
Roger L. Tolliver
Raymond McCallister, Jr.
Susan D. Finke
Thomas R. Davis
Cynthia B. Thompson

Members of the Missouri State Board of Education
Robert E. Bartman,
Commissioner of Education of the State of Missouri,
Appellants,
and
School District of Kansas City, Missouri and Claude C. Perkins, Superintendent thereof,
Appellees,
Icelean Clark; Bobby Anderton;

Eleanor Graham; Gay D. Williams; Kansas City Mantel & Tile Co.; Coulas & Griffin Insurance Agency, Inc.; Sharon Dunham; Lindsay K. Kirk; Robert Frazier; Rick Feierabend; Linda Hollenbeck, James Hollenbeck; Susan Horseman; and Clifford M. Horseman,

Jackson County, Missouri

No. 89-1311

Kalima Jenkins, by her friend, Kamau Agyei; Carolyn Dawson, by her next friend, Richard Dawson; Tufanza A. Byrd, by her next friend, Teresa Byrd, Derek A. Dydell, by his next friend, Maurice Dydell; Terrance Cason, by his next friend, Antoria Cason; Jonathan Wiggins, by his next friend, Rosemary Jacobs Love; Kirk Allan Ward, by his next friend, Mary Ward; Robert M. Hall, by his next friend, Denise Hall; Dwayne A. Turrentine, by his next friend, Shelia Turrentine; Gregory A. Pugh, by his next friend, David Winters, on behalf of themselves and all others similarly situated;

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Appellees,

Icelean Clark; Bobby Anderton; Eleanor Graham; John C. Howard; Craig Martin; Gay D. Williams; Kansas City Mantel & Tile Co.; Coulas & Griffin Insurance Agency, Inc.; Sharon Dunham; Lindsay K. Kirk; Robert Frazier; Rick Feierabend; Linda Hollenbeck; James Hollenbeck; Susan Horseman; and Clifford M. Horseman,

Jackson County, Missouri.

No. 89-1838

Kalima Jenkins, by her friend, Kamau Agyei; Carolyn Dawson, by her next friend, Richard Dawson; Tufanza A. Byrd, by her next friend, Teresa Byrd; Derek A. Dydell, by his next friend, Maurice Dydell; Terrance Cason, by his next friend, Antoria Cason; Jonathan Wiggins, by his next friend, Rosemary Jacobs Love; Kirk Allan Ward; Robert M. Hall, by his next friend, Denise Hall; Dwayne A. Turrentine, by his next friend, Shelia Turrentine; Gregory A. Pugh, by his next

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Thomas R. Davis
Cynthia B. Thompson
Members of the Missouri State Board of Education
Robert E. Bartman, Commissioner of Education of the State of Missouri,

Appellants,

and

School District of Kansas City, Missouri and Claude C. Perkins, Superintendent thereof,

Appellees.

No. 89-1956

Kalima Jenkins, by her friend, Kamau Agyei; Carolyn Dawson, by her next friend, Richard Dawson; Tufanza A. Byrd; Derek A. Dydell, by his next friend, Maurice Dydell; Terrance Cason, by his next friend, Antoria Cason; Jonathan Wiggins, by his next friend, Rosemary Jacobs Love; Kirk Allan Ward, by his next friend, Mary Ward; Robert M. Hall, by his next friend, Denise Hall; Dwayne A. Turrentine, by his

next friend, Shelia Turrentine; Gregory A. Pugh, by his next friend, David Winters, on behalf of themselves and all other similarly situated;

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Appellee,

v.

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Roseann Bentley
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Susan D. Finke
Thomas R. Davis
Cynthia B. Thompson
Members of the Missouri State Board of Education Robert E. Bartman, Commissioner of Education of the State of Missouri,

Appellants,

and

School District of Kansas City, Missouri and Claude C. Perkins, Superintendent thereof,

Appellees.

No. 89-2337

Kalima Jenkins, by her friend, Kamau Agyei; Carolyn Dawson, by her next friend, Richard Dawson; Tufanza A. Byrd, by her next friend, Teresa Byrd; Derek A. Dydell, by his next friend, Maurice Dydell; Terrance Cason, by his next friend, Antoria Cason; Jonathan Wiggins, by his next friend,

Rosemary Jacobs Love; Kirk Allan Ward, by his next friend, Mary Ward; Robert M. Hall, by his next friend, Denise Hall; Dwayne A. Turrentine, by his next friend, Shelia Turrentine; Gregory A. Pugh, by his next friend, David Winters, on behalf of themselves and all other similarly situated;

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American Federation of Teachers, Local 691,

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Roseann Bentley
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Raymond McCallister, Jr.
Susan D. Finke
Thomas R. Davis
Cynthia B. Thompson
Members of the Missouri State Board of Education
Robert E. Bartman, Commissioner of Education of the State of Missouri,

Appellants,

and School District of Kansas City, Missouri and Claude C. Perkins, Superintendent thereof,

Appellees.

No. 89-2643

Kalima Jenkins, by her friend, Kamau Agyei; Carolyn Dawson, by her next friend, Richard Dawson; Tufanza A. Byrd, by her next friend, Teresa Byrd; Derek A. Dydell, by his next friend, Maurice Dydell, Terrance Cason, by his next friend, Antoria Cason; Jonathan Wiggins, by his next friend, Rosemary Jacobs Love; Kirk Allan Ward, his his next friend,

Mary Ward; Robert M. Hall, by his next friend, Denise Hall; Dwayne A. Turrentine, by his next friend, Shelia Turrentine; Gregory A. Pugh, by his next friend, David Winters, on behalf of themselves and all others similarly situated;

Appellees,

American Federation of Teachers, Local 691,

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Roseann Bentley
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Robert E. Bartman, Commissioner of Education of the State of Missouri,

Appellees,

and

School District of Kansas City, Missouri Claude C. Perkins, Superintendent thereof,

Appellees,

Ronika Newton, by her next friends, Ronald and Debra Newton; Marques Bussey, by his next friend, Christie Newman; Brian McClelland, by his next friend, Ella McClelland; Bryant Lightsey, by his next friend, Gina Lightsey; Nia Webster, by her next friend, Ajamu Webster, and Courtney Adams, by her next friend, Clinton Adams, Jr.

Appellants.

77-420-CV-W-4

Appeals from the United States District Court
for the Western District of Missouri.

Filed: May 22, 1991

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the orders of the district court of January 3, 1989, January 13, 1989, April 20, 1989, May 5, 1989, May 24, 1989, and September 11, 1989 are affirmed in accordance with the opinion of this Court.

April 22, 1991

A true copy.

ATTEST: /s/ Michael E. Gans, Acting Clerk

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

MANDATE ISSUED: 5/20/91

APPENDIX B

No. 89-1253

Kalima Jenkins, by her friend, Kamau Agyei, Carolyn Dawson, by her next friend, Richard Dawson; Tufanza A. Byrd, by her next friend, Teresa Byrd; Derek A. Dydell, by his next friend, Maurice Dydell; Terrance Cason, by his next friend, Antoria Cason; Jonathan Wiggins, by his next friend, Rosemary Jacobs Love; Kirk Allan Ward, by his next friend, Mary Ward; Robert M. Hall, by his next friend, Denise Hall; Dwayne A. Turrentine, Turrentine, by his next friend, Shelia Turrentine; Gregory A. Pugh, by his next friend, David Winters, on behalf of themselves and all others similarly situated;

Appellees,

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Missouri Board of Education Roseann Bentley
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Appellees,

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Jackson County, Missouri

No. 89-1311

Kalima Jenkins, by her friend, Kamau Agyei; Carolyn Dawson, by her next friend, Richard Dawson; Tufanza A. Byrd, by her next friend, Maurice Dydell; Terrance Cason, by his next friend, Antoria Cason; Jonathan Wiggins, by his next friend, Rosemary Jacobs Love; Kirk Allan Ward, by his next friend, Mary Ward; Robert M. Hall, by his next friend, Denise Hall; Dwayne A. Turrentine, by his next friend, Shelia Turrentine; Gregory A. Pugh, by his next friend, David Winters, on behalf of themselves and all others similarly situated;

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Jackson County, Missouri.

No. 89-1838

Kalima Jenkins, by her friend, Kamau Agyei, Carolyn Dawson, by her next friend, Richard Dawson; Tufanza A. Byrd, by her next friend, Teresa Byrd; Derek A. Dydell, by his next friend, Maurice Dydell; Terrance Cason, by his next friend, Antoria Cason; Jonathan Wiggins, by his next friend, Rosemary Jacobs Love; Kirk Allan Ward, by his next friend, Mary Ward; Robert M. Hall, by his next friend, Denise Hall; Dwayne A. Turrentine, by his next friend, Shelia Turrentine; Gregory A. Pugh, by his next friend, David Winters, on behalf of themselves and all others similarly situated;

Appellees,

American Federation of Teachers, Local 691,

v.

The State of Missouri; Honorable John Ashcroft, Governor of the State of Missouri; Wendell Bailey, Treasurer of the State of Missouri; Missouri State Board of Education
Roseann Bentley
Dan L. Blackwell
Terry A. Bond, President
Roger L. Tolliver
Raymond McCallister, Jr.
Susan D. Finke
Thomas R. Davis
Cynthia B. Thompson
State Board of Education
Robert E. Bartman, Commissioner of Education of the State of Missouri,

Appellants,

and

School District of Kansas City, Missouri and Claude C. Perkins, Superintendent thereof,

Appellees.

No. 89-1956

Kalima Jenkins, by her friend, Kamau Agyei; Carolyn Dawson, by her next friend, Richard Dawson; Tufanza A. Byrd; Derek A. Dydell, by his next friend, Maurice Dydell; Terrance Cason, by his next friend, Antoria Cason; Jonathan Wiggins, by his next friend, Rosemary Jacobs Love; Kirk Allan Ward, by his next friend, Mary Ward; Robert M. Hall, by his next friend, Denise Hall; Dwayne A. Turrentine, by his next friend, Shelia Turrentine; Gregory A. Pugh, by his next friend, David Winters, on behalf of themselves and all other similarly situated;

Appellees,
American Federation of Teachers, Local 691,
Appellee,

v.

The State of Missouri; Honorable John Ashcroft, Governor of the State of Missouri; Wendell Bailey, Treasurer of the State of Missouri; Missouri State Board of Education
Roseann Bentley
Dan Blackwell
Terry A. Bond, President
Roger L. Tolliver
Raymond McCallister, Jr.
Susan D. Finke
Thomas R. Davis
Cynthia B. Thompson
Members of the Missouri State Board of Education
Robert E. Bartman, Commissioner of Education of the State of Missouri,
Appellants,

and

School District of Kansas City, Missouri and Claude C. Perkins, Superintendent thereof,
Appellees.

No. 89-2337

Kalima Jenkins, by her friend, Kamau Agyei; Carolyn Dawson, by her next friend, Richard Dawson; Tufanza A. Byrd; Derek A. Dydell, by his next friend, Maurice Dydell; Terrance Cason, by his next friend, Antoria Cason; Jonathan Wiggins, by his next friend, Rosemary Jacobs Love; Kirk Allan Ward, by his next friend, Mary Ward, by his next friend, Mary Ward; Robert M. Hall, by his next friend, Denise Hall; Dwayne A. Turrentine, by his next friend, Shelia

Turrentine; Gregory A. Pugh, by his next friend, David Winters. on behalf of themselves and all other similarly situated;

Appellees,

American Federal of Teachers, Local 691,

v.

The State of Missouri; Honorable John Ashcroft, Governor of the State of Missouri; Wendell Bailey, Treasurer of the State of Missouri; Missouri State Board of Education
Roseann Bentley
Dan Blackwell
Terry A. Bond, President
Roger L. Tolliver
Raymond McCallister, Jr.
Susan D. Finke
Thomas R. Davis
Cynthia B. Thompson
Members of the Missouri State Board of Education
Robert E. Bartman, Commissioner of Education of the State of Missouri,

Appellants,

and

School District of Kansas City, Missouri and Claude C. Perkins, Superintendent thereof,

Appellees.

No. 89-2643

Kalima Jenkins, by her friend, Kamau Agyei; Carolyn Dawson, by her next friend, Richard Dawson; Tufanza A. Byrd, by her next friend, Teresa Byrd; Derek A. Dydell, by his next friend, Maurice Dydell, Terrance Cason, by his next friend, Antoria Cason; Jonathan Wiggins, by his next friend, Rosemary Jacobs Love; Kirk Allan Ward, by his next friend,

Mary Ward; Robert M. Hall, by his next friend Denise Hall; Dwayne A. Turrentine, by his next friend, Shelia Turrentine; Gregory A. Pugh, by his next friend, David Winters, on behalf of themselves and all others similarly situated;

Appellees,

American Federation of Teachers, Local 691,

v.

The State of Missouri; Honorable John Ashcroft, Governor of the State of Missouri; Wendell Bailey, Treasurer of the State of Missouri; Missouri State Board of Education
Roseann Bentley
Dan Blackwell
Terry A. Bond, President
Roger L. Tolliver
Raymond McCallister, Jr.
Susan D. Finke
Thomas R. Davis
Cynthia B. Thompson
Members of the Missouri State Board of Education
Robert E. Bartman, Commissioner of Education of the State of Missouri,

Appellees,

and

School District of Kansas City, Missouri and Claude C. Perkins, Superintendent thereof,

Appellees,

Ronika Newton, by her next friends, Ronald and Debra Newton; Marques Bussey, by his next friend, Christie Newman; Brian McClelland, by his next friend, Ella McClelland; Bryant Lightsey, by his next friend, Gina Lightsey; Nia Webster, by her next friend, Ajamu Webster; and Courtney Adams, by her next friend, Clinton Adams, Jr.

Appellants.

Appeals from the United States District Court
for the Western District of Missouri.

Submitted: February 21, 1990
Filed: April 22, 1991

Before LAY, Chief Judge, HEANEY, Senior Circuit Judge,and JOHN R. GIBSON, Circuit Judge.

JOHN R. GIBSON, Circuit Judge.

The Kansas City school desegregation remedy continues to spawn numerous district court orders and appeals therefrom, most of them by the State of Missouri. Here, the State appeals from five separate district court orders that: 1) approved a revised procedure for funding the desegregation remedy; 2) required the State to pay the entire cost of asbestos removal in one phase of the school renovation capital improvements plan and fifty percent of it in the remaining phases of the plan; 3) approved the cost overrun on the construction of the new Central High School and required the State to pay half; 4) approved a formula for calculating costs the school district avoided as a result of the establishment of two new middle schools required by the desegregation plan; and 5) refused to require the desegregation monitoring committee to allow the State to bring its own court reporter to the committee's proceedings. In addition, a group of schoolchildren appeal from an order disqualifying their attorney and denying their motion to modify the magnet school plan. We affirm the orders entered by the district court.

In a June 5, 1984, order the district court rejected claims of interdistrict violations. *Jenkins v. Missouri,* No. 77-0420-CV-W-4, slip op. at 105 (W.D. Mo. June 5, 1984). After hearing additional evidence, the district court found the State of Missouri

and the Kansas City, Missouri School District (KCMSD) liable for racial segregation of students within KCMSD and for failure to dismantle the dual school system. *Jenkins v. Missouri*, 593 F. Supp. 1485, 1503-04 (W.D. Mo. 1984). After additional hearings, the district court ordered intradistrict remedies against KCMSD and the State. This court reviewed these several orders in *Jenkins v. Missouri*, 807 F.2d 657 (8th Cir. 1986) (en banc) (*JenkinsI*), *cert. denied*, 484 U.S. 806 (1987). Additional orders dealt specifically with developing and funding a desegregation plan, including a capital improvement plan, which provided for the renovation of certain existing facilities, construction of new facilities, and a magnet school plan. *Jenkins v. Missouri*, 639 F. Supp. 19 (W.D. Mo. 1985); *Jenkins v. Missouri*, 672 F. Supp. 400 (W.D. Mo. 1987). We affirmed these orders in *Jenkins v. Missouri*, 855 F.2d 1295 (8th Cir. 1988) (*Jenkins II*). The Supreme Court granted *certiorari* to hear appeals related to the funding of the remedy by increased property taxes, *Missouri v. Jenkins*, 490 U.S. 1034 (1990), and affirmed this court's rulings on the issue. *Missouri v. Jenkins*, 110 S. Ct. 1651 (1990).

The implementation and funding of the desegregation remedy has resulted in continued litigation. The district court established a desegregation monitoring committee to oversee implementation of the court's orders, recommend modifications, and consider certain issues subject to review by the district court. The functioning of this committee and issues relating to the remedy and the funding of the remedy were before us in *Jenkins v. Missouri*, 890 F.2d 65 (8th Cir. 1989) (*Jenkins III*). As the parties have continued to differ on the development of the details of the desegregation remedy, the district court has held additional hearings and entered numerous orders. A group of six orders comes to us on appeal in what is now the fourth round of the intradistrict desegregation litigation.[1] While the broad scope

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[1] The State appeals district court orders of January 3, 1989; January 13, 1989; April 20, 1989; May 5, 1989; and May 24, 1989. A group of KCMSD

(Footnote 1 continued on next page)

of the desegregation litigation bears upon each issue in these orders, we believe that it is most efficient to forego a lengthy history and instead state the relevant facts as we discuss the separate issues.

I.

The State first appeals from the district court's order of January 3, 1989, approving a revised procedure for funding the desegregation remedy. *Jenkins v. Missouri*, No. 77-0420-CV-W-4 (W.D. Mo. Jan. 3, 1989).

In response to this court's ruling that the district court exceeded its power in ordering an income tax surcharge to fund desegregation costs, *Jenkins II*, 855 F.2d at 1315-16 (8th Cir. 1988), KCMSD requested increased funds from the State in order to insure that the remedy would be fully funded. The January 3, 1989, order implemented a revised funding method, known as a drawdown procedure, which works as follows: In any given month, desegregation costs are first paid by KCMSD with available desegregation revenues. After KCMSD spends all of its available funds, desegregation expenses are paid by withdrawing money from a special joint program account, into which the Treasurer of Missouri deposits the State's share of desegregation costs. The court ordered the State to maintain an $11 million balance in the account at the beginning of each month. *Jenkins*, slip op. at 4 (Jan. 3, 1989). Prior to this order, the State had been ordered to maintain a $5.25 million balance. The district court increased the State's funding obligation because the State and KCMSD were jointly and severally liable and this court has mandated that the remedies be fully funded.

(Footnote 1 Continued)

schoolchildren (the Ronika Newton group) appeal from an order dated September 11, 1990.

The State argues that the district court erred in ordering the revised drawdown procedure because the State is now required to pay remedial costs for which KCMSD had been previously held to be solely liable. The State boldly argues that the district court has not held the State and KCMSD jointly and severally liable for the legal wrong underlying the remedy. The State urges that the district court did not make a finding of joint and several liability for the underlying wrong at the liability trial, and that the district court's application of joint and several liability was a "recent fabrication" in reaction to the State's successful appeal of the income tax surcharge.

We reject these arguments. We view the State's arguments as mere efforts to relitigate an issue that was settled long ago. In our decision dealing with the funding of the remedy, we made abundantly clear "that the constitutional violations must be remedied and the remedies fully funded." *Jenkins II*, 855 F.2d at 1316. We stated:

> In our earlier en banc opinion we made clear that the remedy ordered by the district court must be fully funded. Should the funds that KCMSD can provide for desegregation expenses under today's decision fall short, the remainder must be paid by the State, as the orders of the district court have imposed joint and several liability on the State and KCMSD.

Id. (citation omitted).

The district court's order recognized this very language in requiring the State to pay the balance of desegregation expenses as a jointly and severally liable party. *Jenkins*, slip op. at 4 (Jan. 3, 1989). In so doing, the district court carefully followed our specific directions that the remedies be fully funded.

The State's argument, with its all too evident personal overtones implying that the district judge recently fabricated a

finding of joint and several liability, is plainly refuted by numerous orders entered in this litigation. For example, the district court order entered November 12, 1986, explicitly found the State and KCMSD jointly and severally liable for a portion of the magnet school plan, and the State solely liable for the remaining costs of its implementation. *Jenkins v. Missouri*, No. 77-0420-CV-W-4, slip op. at 1 (W.D. Mo. Nov. 12, 1986). The same order held the State and KCMSD jointly and severally liable for the cost of the capital facilities program, the site acquisitions, and the magnet school plan. *Id.* at 5-6.

Likewise, in its July 6, 1987, order, the district court applied comparative fault principles to allocate desegregation costs between KCMSD and the State, ruled that the State and KCMSD were "jointly and severally liable for the entire [1987-1988] budget," *Jenkins v. Missouri*, No. 77-0420-CV-W-4, slip op. at 15 (W.D. Mo. July 6, 1987), and ordered contribution between the two constitutional violators to be 75 percent for the State and 25 percent for KCMSD, *id.* at 14. The district court ordered joint and several liability in that instance pursuant to this court's mandate that "the remedy ordered by the Court by fully funded." *Id.* at 15 (quoting *Jenkins I*, 807 F.2d at 686).[2] This court subsequently affirmed the July 6, 1987 order. *Jenkins II*, 855 F.2d at 1308.

It is significant that five other district court orders[3] also refer to the joint and several liability of KCMSD and the State. In

[2] Numerous other orders of the district court found joint and several liability with respect to particular aspects of the remedial plan. *See, e.g.*, Orders of: April 29, 1987, slip op. at 3; August 19, 1987, slip op. at 3-4; September 15, 1987, slip op. at 13; July 25, 1988, slip op. at 28; January 13, 1989, slip op. at 5; March 30, 1989, slip op. at 8; April 4, 1989, slip op. at 3; April 12, 1989; slip op. at 7-8; April 20, 1989, slip op. at 11-12; May 5, 1989, slip op. at 4-5.

[3] November 12, 1986, slip op. at 1; July 6, 1987, slip op. at 15; April 29, 1987, slip op. at 3; August 19, 1987, slip op. at 3-4; September 15, 1987, slip op. at 14-15.

appealing these orders, the State never attacked the findings of joint and several liability. Instead, the State limited its appeals to challenging the amount of financial contribution, the allocation of costs, and alleged violations of the eleventh amendment and federal-state comity principles. In the State's appeal from the district court's allocation of desegregation costs, the State admitted that "the State and KCMSD have been held jointly liable for an intradistrict violation." Reply Brief for Appellant at 27, *Jenkins II*, 855 F.2d 1295 (8th Cir. 1988) (No. 86-1934-WM). In the same appeal, the State argued that "the court repeatedly made the State liable for most of the mandated costs, while casting its orders in the form of joint and several liability." Brief for Appellant at 15-16, *Jenkins II*, 855 F.2d 1295 (8th Cir. 1988) (No. 86-1934-WM). We need not read these statements as admissions that the district court based its orders upon a finding of joint and several liability, however, because the district court orders themselves clearly address that issue.

In *Jenkins II*, we affirmed the five district court orders using the language of joint and several liability. 855 F.2d at 1310-11, 1314 n.8, 1316 n.21. The State's argument that these orders only provided for joint and several liability as to certain parts of the remedy is fully answered by this court's affirmance of these orders. In affirming these orders, we explicitly stated that the remedy must be fully funded and should KCMSD's funds fall short, the remainder must be paid by the State, as a jointly and severally liable party. *Id.* at 1316.[4]

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[4] Two footnotes reiterated this holding:

> We recognize that there may be some circumstances in which the district court could justifiably find that KCMSD did not have sufficient resources to fully fund the apportionment we have affirmed today of the desegregative costs, and if it so finds, we do not preclude the district court from placing the remainder of the burden on the State. It is our intent that KCMSD contribute its share, subject to these considerations.

855 F.2d at 1314 n.18 (citations omitted).

(Footnote 4 continued on next page)

Insofar as the State has any right to complain, not having raised the issue on appeal from the earlier orders, it is evident that the district court based its order on its findings that the State created a system of segregated schools, and that both the State and KCMSD failed to dismantle that system. *Jenkins II*, 855 F.2d at 1300 (citing *Jenkins*, 593 F. Supp. at 1485, 1490, 1504). We entertain no doubt that the district court's 1985 order based its finding of intradistrict liability on the State's and KCMSD's failure to perform a common duty and on an indivisible harm caused by independent separate and concurring torts of two or more tortfeasors. *Jenkins*, 593 F. Supp. at 1503-04. Joint and several liability is, therefore, appropriate. *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 260, and n.8 (1979); *Brickner v. Normandy Osteopathic Hosp. Inc.*, 687 S.W.2d 910, 911 (Mo. Ct. App. 1985); *See Restatement (Second) of Torts* § 878 (1977).

We deem it unnecessary to discuss the several criminal cases cited by the State, or its argument about the burdens placed upon all of the Missouri taxpayers. The State has opposed the district court orders placing a greater financial burden on KCMSD as well as orders placing on the State an obligation to pay for remedies KCMSD could not fund. Simply put, joint and several liability is an issue that has been previously decided by the district court and this court, and we reject the State's effort to argue otherwise.[5] In similar circumstances, we would entertain

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(Footnote 4 Continued)

> While we have rejected the argument urged by a number of the amici and adopted by the dissent that under this principle all costs should be borne by the State, the State does have an obligation to pay any required sums which are beyond the capacity of the school district.

Id. at 1316 n.21.

[5]The State's arguments are at best frivolous and represent another example of the verbal excess we have earlier criticized. *See Jenkins III*, 890 F.2d at 68-69.

the possibility of awarding sanctions, but because a fee will be awarded to prevailing counsel, we are satisfied that it is most appropriate to leave the State with the additional expense it will be required to pay.

II.

The State next appeals from the district court's May 5, 1989, order increasing funding for asbestos abatement in the capital improvement plan ordered as part of the desegregation remedy. *Jenkins v. Missouri*, No. 77-0420-CV-W-4, slip op. at 4-5 (W.D. Mo. May 5, 1989).

KCMSD sought $910,224 in additional funding from the State for 100% of the asbestos abatement costs incurred in the renovation of five elementary schools and one high school.[6] *Id.* at 1. In addition, KCMSD sought a court order authorizing it to proceed with asbestos abatement for all Phase III renovations and directing that the costs of such removal be shared by the State. *Id.* KCMSD also sought a court order establishing guidelines for asbestos abatement for the remainder of the capital improvement plan in compliance with the Asbestos Hazard and Emergency Response Act (AHERA), 15 U.S.C. §§ 2641-2654 (1988).

The district court concluded that asbestos abatement costs were a proper desegregation expense and ordered the additional funding, but allocated the cost equally between KCMSD and the State. *Jenkins*, slip op. at 4 (May 5, 1989). The district court also concluded that asbestos abatement costs in later phases of the capital improvement plan should be allocated equally between

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[6] Cook, Swinney, Volker, Marlborough, Hartman elementary schools and Lincoln Academy.

the State and KCMSD with joint and several liability, and approved the use of the AHERA regulations as guidelines for the asbestos abatement process. *Id.* at 4-5. *See* 15 U.S.C. § 2643; 40 C.F.R. §§ 763.80-99 (1990).

On appeal, the State makes the same arguments that the district court rejected. The State first argues that the presence of asbestos was not caused by illegal segregation in the school district, is not a vestige of segregation, and therefore, the cost of eliminating asbestos is not a cost of desegregation or a cost for which the State can be held jointly and severally liable. The State urges that the duty to abate asbestos has been placed essentially on all schools in the country, and that it is a problem at both formerly all black and formerly all white schools. The State also argues that our earlier decision, *Jenkins II*, required KCMSD to pay asbestos abatement costs out of interest income from capital improvement bonds, and that KCMSD is required to pursue claims against other responsible entities or funding sources before it can recover such expenses from the State.

The district court based its ruling concerning asbestos abatement costs on its previous findings, affirmed by this court, that " '[t]he improvement of school facilities is an important factor in the overall success of this desegregation plan,' " and that " 'safety and *health hazards* [in a school facility are] both an obstacle to education as well as to maintaining and attracting non-minority enrollment.' " *Jenkins*, slip op. at 3 (May 5, 1989) (quoting *Jenkins*, 639 F. Supp. at 40) (emphasis added in May 5 order). The district court also acknowledged this court's conclusion that capital improvements are " 'necessary for successful desegregation,' " *id.* (quoting *Jenkins I*, 807 F.2d at 685), and are " 'required both to improve the education available to the victims of segregation as well as to attract whites to the schools,' " *id.* (quoting *Jenkins II*, 855 F.2d at 1305).

Moreover, we note that the district court ordered the renovation of older school buildings to remedy physical facilities that

" 'have literally rotted,' " *Jenkins II*, 855 F.2d at 1300 (quoting *Jenkins*, 672 F. Supp. at 411) and that both KCMSD and the State caused the decay of these facilities. *Jenkins II*, 855 F.2d at 1305 (citing *Jenkins*, slip op. at 4 (November 12, 1986); *Jenkins*, 639 F. Supp. at 41)). KCMSD presented uncontested evidence to the district court that asbestos was found in existing buildings during the court-ordered renovation, and that many asbestos-containing products that normally would pose no danger (such as flooring), became potentially dangerous when disturbed during the renovation work. Thus, the evidence in the record before the district court differentiates this situation from situations found at other school districts, or for that matter any other public buildings. Here, KCMSD and the State are under an order to remove decay, caused by both, so as to provide safe and healthy school facilities that are not an obstacle to education or desegregation, and asbestos removal is necessary to comply with that order. The unique circumstances presented here cause us to conclude that the district court did not err in holding that asbestos abatement costs are a proper desegregation expense, and in requiring the State to assume a portion of these costs as a jointly and severally liable party.

The State's remaining arguments on this issue require little discussion. The State's insistence that our earlier decision required KCMSD to fund asbestos removal out of interest from funds generated by the bond issue simply does not square with the language in our opinion. *See Jenkins II*, 855 F.2d at 1306. Our language in that decision suggested only that interest from bond proceeds will be available as a possible source of funding KCMSD's share of additional desegregation expenses, such as additional asbestos removal costs. *Id.* Likewise, the argument that the district court abused its discretion in not requiring KCMSD to pursue claims against responsible entities is fully answered by the fact that such litigation has commenced, as demonstrated by pleadings furnished to this court of which we

take judicial notice. *School Dist. v. Acands, Inc.*, No. 87-903-CV-W-9 (W.D. Mo., docketed Oct. 23, 1987). Similarly, we cannot conclude that the district court abused its discretion in refusing to allow the State to make its own asbestos survey of the KCMSD schools. We reject this argument in light of the facts that the State declined to participate in the formulation of a plan for asbestos abatement in the KCMSD schools or to initiate joint meetings with the staff, and that the desegregation monitoring committee was kept abreast of the asbestos abatement problems.

We further note that the State did not appeal earlier orders of the district court and this court that included asbestos abatement costs in the capital improvements plan. Asbestos abatement costs were included in the budgets for Phase III capital improvement projects that the district court held were to be financed by the State, *see* 639 F. Supp. at 56, and the budget in the long range capital improvement plan approved by this court. *Jenkins II*, 855 F.2d at 1295. Accordingly, for the reasons stated above, we cannot conclude that the district court's characterization of asbestos abatement costs as a desegregation expense is clearly erroneous. *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985).

III.

The State next appeals from that portion of the district court's January 13, 1989, order that approved a decision of the desegregation monitoring committee refusing to allow a court reporter to be present at its proceedings. *Jenkins v. Missouri*, No. 77-0420-CV-W-4, slip op. at 5 (W.D. Mo. Jan. 13, 1989). The district court held that the committee was not intended to function with "overly formal procedures," and that the presence of a court reporter would tend to increase the level of formality and thereby hinder "an open exchange of thoughts, opinions and ideas. *Id.*

As the creation of this committee was within the district court's equitable power, and as the parties have a right to appeal the committee's rulings to the district court, we are not convinced that the district court erred or abused its discretion by denying the State's request to require the committee to allow the presence of a court reporter at its meetings. Our earlier opinion made clear that the use of this committee is based upon the right of de novo appeal, and we believe it best to leave the details of the committee's functioning to the district court's sound discretion. The State has established neither an error compromising legal rights nor an abuse of discretion. We affirm the district court's order refusing to require the committee to allow a court reporter at its proceedings.

IV.

The State appeals from the district court's May 24, 1989, order that adopted a formula for calculating costs that were avoided in other parts of the school system in 1987-88 because of the establishment of Lincoln and New Paseo middle schools. *Jenkins v. Missouri*, No. 77-0420-CV-W-4 (W.D. Mo. May 24, 1989). In making its determination, the district court accepted KCMSD's proposal, which divided costs into fixed and variable components. The court found that fixed costs would not generate cost avoidance because they are necessary to operate the schools regardless of enrollment, and that variable costs might generate cost avoidance because they are independent on enrollment and calculated on a per pupil basis. *Id.* at 4-5.

The State argues that the court should adopt a formula previously used to calculate the magnet transportation budget that, incidentally, the State had unsuccessfully opposed on appeal in *Jenkins III*. 890 F.2d at 69. The State's approach would multiply the number of students from the KCMSD attending Lincoln and New Paseo middle schools by the inflation-adjusted per pupil cost of educating them elsewhere in the school district. The per

pupil cost would be based on the per pupil figure used in the 1984-85 school year, the year preceding implementation of the desegregation plan, and would be adjusted for inflation. The State's formula would result in a cost avoidance figure of $2,278,604, as compared with the $96,106 reached by application of the KCMSD formula. *Jenkins*, slip op. at 2-3 (May 24, 1989).

The KCMSD formula resulted in a lower cost avoidance figure because it divided costs into fixed and variable categories and excluded from its calculation such fixed items as the costs of principals, assistant principals, instruction coordinators, librarians, cafeteria employees, nurses, clerical employees, security guards, utilities, maintenance, equipment, telephone service, and other similar expenses. *Id.* at 4-5. The court found that these costs will occur at other schools in KCMSD regardless of the transfer of some of their students to Lincoln and New Paseo. *Id.* at 5. Variable costs that were avoided by the opening of the two middle schools include the costs of such items as supplies, textbooks, and postage. The district court found that these costs will decline at other schools in KCMSD as their students transfer to Lincoln and New Paseo. *Id.*

The district court thus concluded that the distinction between fixed and variable costs was valid, and it rejected the State's proposal because it included fixed costs that are not avoided elsewhere as a result of student transfers to Lincoln and New Paseo.

The State argues, in addition to advocating application of the magnet transportation budget formula, that the use of the KCMSD formula violates limitations on desegregation remedies announced in *Milliken v. Bradley*, 418 U.S. 717 (1974) (*Milliken I*) and reiterated in *Milliken v. Bradley*, 433 U.S. 267 (1977) (*Milliken II*).

In *Milliken I*, the Court stated that "the scope of the remedy is determined by the nature and extent of the constitutional violation." 418 U.S. at 744. In *Milliken II*, the Court emphasized that "federal-court decrees must directly address and relate to the constitutional violation itself." 433 U.S. at 282. KCMSD agrees that *Milliken I* and *Milliken II* require that the State receive an appropriate credit for any savings in the KCMSD's operating budget that result from operation of the new magnet schools funded by the desegregation plan's base budget. KCMSD asserts that its formula abides by *Milliken I* and *Milliken II* by insuring that nondesegregation costs are excluded from the State's obligation.

By relying on *Milliken I* and *Milliken II*, the State is apparently arguing that the district court made an error of law. We see no basis for concluding that the district court applied rules of law that conflict with *Milliken I* and *Milliken II*, and are convinced that nothing in the *Milliken* cases in any way impinges upon the district court's factual findings or analysis.

The determination of the proper formula to calculate costs avoided necessarily involves a distinctly fact-bound inquiry, and, indeed, the district court here made detailed findings of fact. Factual findings are not overturned unless clearly erroneous, Fed. R. Civ. P. 52(a), and the State makes no effort to demonstrate that the district court clearly erred.

In analyzing the cost avoidance issue, we are convinced of the necessity of distinguishing between fixed and variable costs. We therefore conclude that the district court did not err in rejecting a formula that did not incorporate that distinction nor in accepting a formula that properly relied on that distinction. As time goes on, and the desegregation plan is further implemented, the district court is free to consider further arguments that the application of a different formula to costs avoided is warranted.

For the foregoing reasons, we affirm the district court's order on the cost avoidance issue.

V.

The State next argues that the district court exceeded its authority in approving an increase of $8,231,565 in Central High School's construction budget. *Jenkins v. Missouri*, No. 77-0420-CV-W-4 (W.D. Mo. Apr. 20, 1989). The district court's November 12, 1986, order had approved a budget for capital facilities in magnet schools, including $15,243,050 for Central High School. *Jenkins v. Missouri*, No. 77-0420-CV-W-4, slip op. at Attachment B (W.D. Mo. Nov. 12, 1986). The April 1989 order increased Central's budget to $23,474,615, and quoted language in the November 1986 order which stated "that the budget 'consists of studied estimates which would be adjusted as actual costs are ascertained.' " *Jenkins*, slip op.at 3 (April 20, 1989) (quoting *Jenkins*, slip op at 4, 6 (Nov. 12, 1986)).

The district court in its April 20, 1989 order found: 1) that the location of Central in the predominantly black central corridor area of Kansas City made its desegregation a challenge; 2) that alterations in and additions to the planned athletic facilities, which include an olympic-size pool, indoor running track, and a gymnastics facility, caused the budget for such facilities to exceed preliminary estimates; 3) that the expanded athletic facilities and the space allocation of 220 square feet per student are necessary to implement the Computers Unlimited and Classical Greek magnet themes and to attract non-minority students; 4) that the planned Central facilities are more extensive than any other high school in the Kansas City area and that such facilities are necessary to attract non-minority suburban students to the inner city; 5) that the original budget omitted costs for architects and engineers, advertising, soil surveys and testing, furniture and construction contingencies; 6) that the original budget assumed a net space to gross space efficiency ratio of 85 percent,

while the new budget assumes a 72 percent ratio.[7] *Jenkins*, slip op. at 1-8 (April 20, 1989).

The district court stated that the State did not contest KCMSD's motion for approval of a site acquisition and preparation budget or KCMSD's motion for a $1,739,077 increase in Central's equipment budget. *Id.* at 9-10.

The district court approved the Central High construction, site acquisition and preparation, and equipment budgets, *id* at 10-11, but rejected the planned installation of a 10-meter diving platform, *id.* at 5. The court held that costs associated with the construction and site acquisition and preparation budgets approved in its order shall be allocated equally between the State and KCMSD, with joint and several liability. *Id.* at 11. The court also held that the costs associated with the equipment budget shall be allocated 75 percent to the State and 25 percent to KCMSD, with joint and several liability. *Id.*

The State argues that the district court erred in approving the overrun in Central's construction and equipment budgets because KCMSD failed to prove or even plead the changed circumstances necessary to justify modifying an existing injunction. The State contends that the district court erred by failing to require such proof. The State further argues that the district court erred in modifying its November 1986 order to impose joint and several liability on the State for additional amounts approved by the district court to construct and equip Central. The State contends that KCMSD should fully fund the budget increases because the Central cost overrun resulted either from errors by

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[7] The ratio of useable space (which excludes space for circulation, restrooms, mechanical equipment and janitor's closets) to total space is referred to as "efficiency." A 75 percent efficiency ratio is usual for school buildings. *Jenkins*, slip op. at 8 (April 20, 1989).

KCMSD in formulating the original estimate or from plans to enhance Central beyond what is necessary to achieve desegregation.

The State asserts that KCMSD unjustifiably expanded Central's plans after the district court approved the original budget estimate instead of attempting to adjust the plans to conform to the budget. It also contends KCMSD did not inform the district court of the planned increase in Central's facility and budget for 18 months in an attempt to "maneuver" the district court into acceding to its wishes.

We are not persuaded by the State's argument that the district court exceeded its authority in modifying injunctive relief. We have held that a federal court has "inherent jurisdiction in the exercise of its equitable discretion and subject to appropriate appellate review to vacate or modify its injunctions." *Booker v. Special School Dist. No. 1*, 585 F.2d 347, 352 (8th Cir. 1978), *cert. denied*, 443 U.S. 915 (1979). School desegregation plans are particularly likely to need adjustment. As the Supreme Court has observed regarding such cases: "[E]quity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." *Milliken II*, 433 U.S. at 288 (quoting *Brown v. Board of Educ.*, 349 U.S. 294, 300 (1955)). The Fifth Circuit recently cited with approval a treatise that stated: " '[A] court must continually be willing to redraft the order at the request of the party who obtained equitable relief in order to insure that the decree accomplishes its intended result.' " *United States v. Lawrence County School Dist.*, 799 F.2d 1031, 1046 (5th Cir. 1986) (quoting 11 C. Wright & A. Miller, Federal Practice and Procedure, § 2961, at 599 (1973)).

We have said that the basic responsibility for determining whether and to what extent an injunction should be modified "rests primarily on the shoulders of the district court that issued

the injunction in the first place." *Booker*, 585 F.2d at 353. Based on the foregoing authorities, we conclude that the district court had the authority to modify its earlier injunctive order.

The district court correctly recognized that the November 1986 budget consisted of studied estimates to be adjusted as actual costs were ascertained. The State's argument essentially seeks to require KCMSD to construct a new Central High for the amount of the original estimate plus a contingency overrun and engineering and architectural fees totaling approximately $3.3 million. The April 1989 order establishes that the district court carefully considered the extensive evidence regarding the design process for Central, including the athletic facilities, the classical Greek and computer magnet programs, and the size and space requirements for the school. The court's analysis particularly focused on the attractiveness of Central's facilities to non-minority students. The district court cited the removal of certain athletic, art and music facilities from Central's design plans and the efforts of the project management team to live within the original budget as factors indicating KCMSD's efforts to reduce Central's cost. *Jenkins* slip op. at 8-9 (April 20, 1989). The district court also pointed out that even a witness for the State conceded that the Central High concept was outstanding and could help achieve desegregation in the KCMSD. *Id.* at 9.

After carefully considering the evidence regarding space needs for the magnet programs and athletic facilities, the district court found that the space allocation of 220 square feet per student was justified and that the "magnet programs" could not be successfully implemented in a lesser facility." *Id.* at 8. While the original budget contained certain flaws, the district court found that the process used by KCMSD in the design of Central followed the procedures the State's expert outlined as normally used by educators and architects in designing schools. *Id.* at 4. The district court therefore rejected the State's claim that the design process was inappropriate. *Id.*

The State makes no argument that any of the district court's findings are clearly erroneous. The State characterizes the district court's findings as "policy judgments" and argues that its determinations should be subject to de novo review. We reject the State's argument as wholly unpersuasive. Applying the standard of *Bessemer City*, 470 U.S. at 573-74, we are convinced that the district court did not clearly err in finding that the KCMSD's design process was appropriate, that the additions to the planned athletic facilities were justified, that the allocated space of 220 square feet per student is necessary to implement the magnet themes and enhance the school's attractiveness to non-minority students, and that the increased construction and equipment budgets are necessary to meet the design requirements.

The State's final argument, concerning joint and several liability, is an argument with which we have already dealt in this decision. The State's argument is particularly unpersuasive in view of the fact that the November 1986 order charged the State with joint and several liability for the costs of the capital improvements and new construction and made the State solely liable for a portion of the relief ordered. *Jenkins*, slip op. at 1, 5-6 (Nov. 12, 1986).

This court affirmed the November 1986 order following an appeal by the State. *Jenkins II*, 855 F.2d at 1308. The State did not appeal to this court the finding of joint and several liability for the capital facilities program that included Central. Joint and several liability for the construction costs of Central is thus the law of the case. *See Liddell v. Missouri*, 731 F.d 1294, 1304-5 (8th Cir. 1984) (en banc), *cert. denied*, 469 U.S. 816 (1984).

In sum, the district court's November 1986 order expressly stated that the capital improvements budget was subject to adjustment as actual costs were ascertained. The district court based its April 1989 order on factual findings that the State does

not allege to be clearly erroneous. We are convinced that the district court did not err in exercising its equitable power to modify the original cost estimates, and we therefore affirm its April 1989 order permitting an increase in the construction and equipment budgets for Central High School and allocating costs between the State and KCMS with joint and several liability.

VI.

The last of the appeals before us[8] is from the district court's order disqualifying the attorneys for the Ronika Newton group, a group pf black schoolchildren, and denying their motion to modify the long-range magnet school plan. *Jenkins v. Missouri*, No. 77-0420-CV-W-4, slip op. at 10-11 (W.D. Mo. Sept. 11, 1989). The district court permitted the Newton group to file an amicus brief in which the group sought to eliminate the racial quota guidelines from the magnet plan's admission standards. *Jenkins*, slip op. at 1, 8 (Sept. 11, 1989).

The district court disqualified the Newton group's counsel, Mark J. Bredemeier, Jerald L. Hill and Richard P. Hutchinson, of the Landmark Legal Foundation, because they "previously represented and currently represent [ ] in this litigation interests adverse to the interest of movants." *Id.* at 10. The Landmark attorneys were, and continue to be, counsel of record for amici curiae Icelean Clark and others in actions challenging the court-ordered property and income tax surcharges. *Id.* at 9-10. Landmark also represented intervenors Eleanor Graham and others

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[8] The State also appealed a November 15, 1988, order that awarded the Jenkins class fees under 42 U.S.C. § 1988 (1988) at "market rates" for paralegal workers and law clerks. *Jenkins v. State of Missouri*, No. 77-0420-CV-W-4, slip op. at 6-9 (W.D. Mo. Nov. 15, 1988). The State withdrew this appeal after the Supreme Court decided the issue in *Missouri v. Jenkins*, 109 S. Ct. 2463, 2471-72 (1989).

when that group challenged the court-ordered property tax increases. *Id.* Landmark's clients in this case, the Newton group members, are participants in the magnet school program, and as such are direct beneficiaries of the same court-ordered taxes that Landmark opposed in its representation of the Clark and Graham groups and continues to oppose by representing the Clark group today.

In reaching its decision to disqualify, the district court cited the ABA Model Code of Professional Responsibility EC 5-15 (1980) which states: "A lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests."[9] *Id.* (quoted in *Jenkins*, slip op. (Sept. 11, 1989). Rule 1.7 of the Missouri Supreme Court Rules of Professional Conduct (1986) (found at Missouri Rule 4) prohibits presentation of a client if the representation "may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests. . . ."

We have, in attorney disqualification issues, stated that the district court bears responsibility for supervision of the members

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[9] The Newton group's brief points out that the district court for the Western District of Missouri does not follow the ABA Model Code of Professional Responsibility, which contains Ethical Consideration 5-15. Under rule 2(D)(2) of the Rules of the District Court for the Western District of Missouri (1983), the Western District follows whatever rules of professional responsibility the Missouri Supreme Court adopts, and on August 7, 1985, the Missouri Supreme court adopted the newer Model Rules of Professional Conduct. Missouri Rule 4. On this issue the Model Rules are substantially similar to the Model Code. Model Rule 1.7 states: "A lawyer shall not represent a client if the representation of that client will be directly adverse to another client . . ." Model Rules of Professional Conduct Rule 1.7 (1983); Missouri Rule 4 (Rule 1.7).

of its bar. *Fred Weber, Inc. v. Shell Oil Co.*, 566 F.2d 602, 605 (8th Cir. 1977) (citing *Hull v. Celanese Corp.*, 513 F.2d 568, 571 (2d Cir. 1975)) (subsequent history omitted). *See also Central Milk Producers Coop. v. Sentry Food Stores, Inc.*, 573 F.2d 988, 991-93 (8th Cir. 1978); *Black v. Missouri*, 492 F. Supp. 848, 859 (W.D. Mo. 1980). The district court's action in this case is discretionary and will only be upset upon a showing of abuse of discretion. *Fred Weber, Inc.*, 566 F.2d at 606. That discretion is particularly broad in class actions, and especially when, as in this case, there is ongoing litigation. *Mendoza v. United States*, 623 F.2d 1338, 1346 (9th Cir. 1980) ("class suit imposes special responsibilities upon the trial judge" because it carries "inherent dangers of conflict"), *cert. denied*, 450 U.S. 912 (1981). *See* Fed. R. Civ. P. 23(d) (granting district court authority to make "appropriate orders" in class actions).

On behalf of the Newton group, Landmark argues that its appearance before the Supreme Court on the tax issue has not and will not have any effect on the magnet school plan or full funding of the desegregation plan. Landmark argues that neither the Clark nor the Graham group has ever contested the implementation of the desegregation plan, or that it should be fully funded, only the propriety of funding via court-imposed taxes. Landmark further argues that vague and general inconsistencies giving rise to hypothetical conflicts do not justify disqualification.

We are unconvinced by these arguments. The district court made the following statements about the conflict arising from Landmark's representation:

> [The Newton group members'] desire to participate in the magnet school program evidences their interest in the successful implementation of the desegregation remedy, which includes the magnet school program. As a result, [the Newton group members] would benefit from the court-

> ordered income tax surcharge and property tax increase, which amici curiae Icelean Clark, et al, previously opposed and currently opposes through representation by [the Newton group's] counsel. Thus, it is clear that amici curiae Icelean Clark, et al's, interest in reversing the court-ordered taxes to fund the desegregation remedy is adverse to [the Newton group's] interest in seeking greater access to magnet schools.

Jenkins, slip op. at 10 (Sept. 10, 1989).

When this appeal was argued before use, Landmark had represented the Clark group before the Supreme Court on the tax issue,[10] and was awaiting the Court's decision. We also take judicial notice that Landmark continues to represent the Clark group in further litigation not only before the district court, but in this court. In representing the Clark group, Landmark's efforts threatened the viability of the desegregation plan by challenging the plan's funding.

Landmark's representation of the Newton group while still counsel of record for the Clark group presented a genuine conflict of interest. The district court recognized this potential conflict and correctly disqualified Landmark from the Newton group's motion.

Landmark also argues that no conflict of interest arises out of its prior representation of the Graham group because the district court dismissed the Graham group from this litigation after that group prevailed on its only claim. Landmark complains that the district court relied on a boilerplate allegation from the memorandum in support of the Graham group's motion to intervene in the surcharge refund action and that the alleged conflict is irrelevant because those proceedings have ended.

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[10] *Missouri v. Jenkins*, 110 S. Ct. 1651, 1664 n.19 (1990) (decision filed April 18, 1990).

We recognize, as did the district court, that the Graham group was no longer a party in the *Jenkins* litigation when Landmark began representing the Newton group. The district court did not base its disqualification on a conflict of interest arising out of Landmark's prior representation of the Graham group and its present representation of the Newton group. The court only quoted statements Landmark made during the previous representation because the reasoning therein provided additional support for the court's decision to prevent Landmark's concurrent representation of the Newton and Clark groups. *See Jenkins*, slip op. at 10-11 (Sept. 11, 1989).

The district court relied specifically on an allegation in the Graham group's motion for leave to intervene that stated: "All of the present parties *clearly* have interests adverse to those of Applicants: Plaintiffs [including the Ronika Newton group members], *obviously*, are the direct beneficiaries of the revenues generated by the income tax surcharge." *Id.* at 10-11 (citing Graham group's memorandum in support of motion to intervene at 3) (emphasis added by district court). The district court viewed this statement as an admission by Landmark that a conflict of interest exists between two parties when one party wishes to challenge the legitimacy of a court-ordered remedy and another party stands to benefit from the same remedy the first party is challenging. We find no error in the district court 's application of this reasoning to Landmark's simultaneous representation of the Clark and Newton groups.

We also reject Landmark's attempt to brand an allegation essential to the Graham group's right to intervene as simply boilerplate. Such categorization is inappropriate in light of Fed. R. Civ. P. 11, which requires an attorney filing a pleading to sign the pleading thereby certifying that "to the best of the signer's knowledge, information and belief formed after reasonable inquiry it is well grounded in fact." *Id.*

Landmark argues that to the extent any conflict of interest arises by its representation of the Newton group, this conflict is ameliorated by the informed consent of that group's members. *See* Rule 1.7 of the Missouri Supreme Court Rules of Professional Conduct. The Newton group members are minor schoolchildren, and as such, are not capable of giving fully informed consent. We observe that a trial court has a special obligation to see that minors are properly represented, *United States v. Reilly*, 385 F.2d 225, 228 (10th Cir. 1967), because it assumes the ultimate responsibility for determinations made on behalf of children. *Noe v. True*, 507 F.2d 9, 12 (6th Cir. 1974); *Black v. State of Missouri*, 492 F. Supp. 848, 869 (W.D. Mo. 1980). Thus, by disqualifying Landmark as the Newton group's counsel, the district court properly discharged its special responsibility by deciding that conflicts of interest rendered Landmark an inappropriate advocate of the Newton group.

We find no abuse of discretion in the district court's decision to disqualify Landmark. In *Central Milk*, we stated the general rule that "we encourage the district courts to strictly enforce the Code of Professional Responsibility." 573 F.2d at 993. With that in mind, we affirm the district court's decision to disqualify.

The Newton group argues that despite disqualification of counsel, the district court should nonetheless, have considered the group's motion to modify the long-range magnet school plan. We believe that the district court correctly denied the motion because the Newton group was acting through counsel, and counsel had been disqualified. We also point out that counsel had not filed a motion to intervene on behalf of the Newton group, although it is evident from their representation of other amici and interested parties that they were aware of this procedure. Finally, the Newton group concedes that its members have all been admitted to magnet schools since the filing of this action, Brief for Appellants at 5 n.3, *Jenkins v. Newton* (8th Cir. 1989) (No. 89-263) so it is likely their action would now be moot. *See Carson v. Pierce*, 719 F.2d 913, 933 (8th Cir. 1983).

With regard to modifying the magnet school plan, this court affirmed the present version of the program. *See Jenkins II*, 855 F.2d at 1301-04. Certainly as time passes, the magnet school program will be subject to modification. Indeed, in the order now under appeal, the district court considered a motion by the Jenkins class to modify admissions policy and the racial quota that the district court established. The appellate briefs also inform us of other ongoing efforts to modify the magnet school racial guideline policy. We are satisfied that our best course at this time is to affirm the district court order of September 11, 1989, and leave further development of this issue for the future.

We affirm the orders of the district court of January 3, 1989, January 13, 1989, April 20, 1989, May 5, 1989, May 24, 1989, and September 11, 1989.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, et al.,
Plaintiffs,

vs.

STATE OF MISSOURI, et al.,
Defendants.

Filed: April 20, 1989

ORDER

Before the Court is the KCMSD's motion for approval of a site for Central High School and for increases and modifications in the budgets for building construction and equipment for the magnet programs. Plaintiffs support the KCMSD's motion. The State of Missouri opposes the KCMSD's motion. A hearing regarding the KCMSD's motion was held on March 15-17, 1989. The KCMSD's motion will be granted as set forth in this order.

Central High School is virtually an all black school located in the central corridor area of Kansas City where the residential population is substantially all black. Therefore, the desegregation of Central is a challenge. The Long Range Capital Improvements Plan ("LRCIP") calls for the discontinued use of the existing Central facility to be replaced by a new facility housing Computers Unlimited and Classical Greek Magnet programs. The KCMSD filed a motion for approval of a site for Central High School and for increases and modifications in the budgets for building construction and equipment for the magnet pro-

grams. The KCMSD seeks approval of: (1) a site acquisition and preparation budget for Central of $7,010,166; (2) an increase in the Central construction budget from $15,243,050 to $23,474,615; and (3) a $1,739,077 increase in the equipment budget for Central with realignment of the budget years in which equipment expenditures will be made. The DMC voted to take no exception to the proposals in the KCMSD's motion.

The KCMSD seeks an increase in the Central construction budget arguing that "the Central High School project has proven to be one that requires funding more than 10% in excess of the original estimate." Suggestions in Support of the Motion of the KCMSD for Approval of a Site for Central High School and for Increases and Modifications in the Budgets for Building Construction and Equipment for the Magnet Programs at 6. The KCMSD argues that the original construction budget estimates were not based on detailed design drawings, but instead were based on approximation of the square footage and particular facilities that would be required for the program. The KCMSD continues by stating that as the magnet programs were developed and preliminary building design began, it became apparent that the original construction budget was based on several assumptions that were not practical. The KCMSD cites three principal reasons why the new construction budget exceeds the original construction budget: (1) the original budget assumed that the area inside an indoor track could be used for enclosed athletic areas such as locker areas and a weight room, while the new budget proposed that the enclosed spaces be located elsewhere, thereby resulting in an increase in square footage; (2) the original budget assumed the ratio of net space to gross space to be approximately 85%, while the constraint of working around the existing Central facility results in a net-to-gross space ratio of approximately 72% for the new budget; and (3) the original budget excluded necessary costs for architects' and engineers' fees, soil surveys and testing, and advertising. The KCMSD

concludes by arguing that the new budget is based on detailed and extensive program development and months of analysis by architects and educational planners and that the new budget is reasonable and necessary to provide an appropriate facility for the Central magnet programs.

The State opposes the KCMSD's motion on four grounds: (1) the Court has previously approved a Central construction budget of $15,243,050; (2) the process employed by the KCMSD in designing Central was flawed; (3) the athletic facilities included in the Central design are too extensive; and (4) the square footage of the Central design is too large.

Although the Court previously approved a $15,243,050 estimated construction budget for Central, *Jenkins v. State of Missouri*, Order of November 12, 1986, Attachment B at 1, the Court recognized that the budget "consists of studied estimates which would be adjusted as actual costs are ascertained," *id.* at 4, 6. Therefore, the Court will entertain the KCMSD's motion for an increase in the Central construction budget.

The State' architectural expert, Mr. David Pearce, set out six steps followed in the design process of an educational facility prior to construction: (1) bond issue planning; (2) project definition phase in which the educators define the program; (3) schematic design phase; (4) design development drawings; (5) construction document phase; and (6) bid award phase. (Tr. at 542-49). Mr. Pearce testified that he was "concerned" about the design process of Central and that there was uncertainty "as to how to arrive at a program [and] how to take that program through the design process." (Tr. at 556). Mr. Pearce stated that in his opinion the Central program was still "in a state of flux . . . and that someone has to decide what the program is so that the building can be designed to meet that program." (Tr. 561). The first step in the design process described by Mr. Pearce, bond issue planning, is not applicable to the Central design. However, Mr. Arthur

Rainwater, the Central High School principal involved extensively from the education side of the Central design process, testified previously to Mr. Pearce that the Central design process began with Mr. Rainwater and Dr. Simpson designing an educational facilities program, proceeded through the schematic design and design development phases and is currently in the construction document phase. (Tr. at 15). Thus, it is apparent that the KCMSD's design process for Central has followed the exact procedure the State's own expert outlined as normally used by educators and architects in designing educational facilities. The State's claim that the KCMSD's design process for Central was inappropriate is without merit.

The Long Range Magnet Plan ("LRMP") states that Central "will be equipped with the latest physical education equipment . . . [and] will have extensive sport and physical education facilities." LRMP at 80. Specifically, the LRCIP calls for a natatorium, fieldhouse, outdoor track, tennis courts, football field, soccer field and rugby field. LRCIP, Appendix II at 28. The State objects to the extent of the athletic facilities contained in the Central design.

The LRCIP calls for a natatorium including "an olympic size pool, with high diving platform and other boards, separate locker and shower facilities for males and females" with "sufficient seating to accommodate 400 spectators." LRCIP, Appendix II at 28. Several witnesses, including the State's, interpreted "an olympic size pool" to be a 50 meter pool. (Tr. at 66, 502-03, 531, 604). The Central design includes a 50 meter pool. Although he agreed that swimming can be taught in a pool less than 50 meters, (Tr. at 146), Mr. Rainwater testified that a 50 meter pool would be more attractive to suburban, non-minority students, (Tr. at 73). Plaintiffs' witnesses consisting of swimming coaches and parents of suburban students involved in swimming supported Mr. Rainwater's testimony regarding the attractiveness of a 50 meter pool. (Tr. at 243, 266-67, 276-77, 435-36, 448-49). Mr.

Bruce Breiner, a witness for the State, also testified that a 50 meter pool would be a positive factor in attracting non-minority students from the suburbs, (Tr. at 523-24), and another witness for the State, Mr. John Maher, testified that swimming is attractive to non-minority students, (Tr. at 488). The 50 meter pool in the natatorium is attractive because it provides year-round training in a long course pool, which is not available in suburban Kansas City. (Tr. at 68-69, 241-42, 264-65, 445-46). The Court finds that the desegregative attractiveness of the 50 meter pool justifies its inclusion in the Central design.

The LRCIP's "high diving platform" was interpreted to be a 10 meter diving platform. (Tr. 67, 503). The Central design includes a 10 meter diving platform. Mr. Rainwater testified that the diving platform would be attractive to suburban students. (Tr. at 68-69, 73-74). Mr. Paul Swafford, a diving coach, supported Mr. Rainwater's testimony regarding the attractiveness of a 10 meter platform. Plaintiffs' Exhibit 1 at 18, 24. Mr. Breiner and Mr. Maher, both witnesses for the State, stated that diving would be attractive to non-minority students. (Tr. at 488, 524). However, Mr. Breiner testified that he would be concerned about a 20 meter diving platform from a safety and liability standpoint. (Tr. at 522). The Court is not convinced that the desegregative attractiveness of the 10 meter diving platform outweighs the dangers and costs of construction and liability insurance associated with the platform. Therefore, the Court will not approve the inclusion of the 10 meter diving platform in the Central design to be funded by the KCMSD and the State. If the KCMSD desires to include such a platform in the Central design, the platform shall be funded 100% by the KCMSD. The Court will approve the inclusion of the diving boards in the Central design.

The LRCIP calls for a fieldhouse to include "an indoor running track, basketball court, spa, athletic training facilities, two racketball and handball courts, separate lockers and showers

for males and females, a weight room, and wrestling facilities." LRCIP, Appendix II at 28. Mr. Rainwater interpreted an "indoor running track" to be the same as a competition track, not a jogging track. (Tr. at 149-50). The design of Central includes a one-tenth mile indoor track. A one-tenth mile track is the smallest track that would allow a minimum configuration of three basketball courts within it. (Tr. at 63). Mr. Rainwater testified that an indoor track would be attractive to suburban students (Tr. at 64-65). Plaintiffs' witnesses consisting of track coaches and a parent of a suburban student involved in track supported Mr. Rainwater's testimony regarding the attractiveness of an indoor track. (Tr. at 244-46, 281-82, 384-85). The indoor running track is attractive because it provides year-round training with less health hazards. (Tr. at 64, 245, 282, 384). The Court finds that the desegregative attractiveness of the one-tenth mile indoor track justifies its inclusion in the Central design.

Although the LRCIP does not call for a dedicated gymnastics facility for Central, such a facility is included in the Central design. Mr. Rainwater testified that the gymnastics facility was included in the Central design for two reasons: (1) it would be a major attraction to non-minority suburban students; and (2) it would be logical to provide gymnastics in a Classical Greek program in high school because the LRMP requires all students in a Classical Greek program in grades K-8 to participate in gymnastics every year. (Tr. at 78-79). Witnesses for both the plaintiffs and the State supported Mr. Rainwater's testimony regarding the attractiveness of a dedicated gymnastics facility. Plaintiffs' Exhibit 1 at 19-24; (Tr. 487-88, 523). The dedicated gymnastics facility is attractive because it provides year-round training with greater safety. (Tr. at 80); Plaintiffs' Exhibit 1 at 19-21. The State's own witness agrees that gymnastics should be conducted in a dedicated facility. (Tr. at 487). Although the LRCIP does not specifically include gymnastics in the Classical Greek Magnet program, Dr. Daniel Levine clearly states that

gymnastics were envisioned as a strong part of the program. Deposition of Daniel Levine at 25-26, 68. The Court finds that the desegregative attractiveness of the gymnastics facility justifies its inclusion in the Central design. The LRMP states that the Central physical education program "will continue the emphasis from the elementary and middle school program." LRMP at 80. Thus, it is consistent with the LRMP to implement a gymnastics program at Central because students in grades K-8 are required to participate in gymnastics every year. Additionally, the desegregative attractiveness of the gymnastics program will be retained at the high school level.

The size and scope of the remaining athletic facilities included in the Central design are not specifically challenged by the State. The Court finds that such facilities are necessary and appropriate inclusions in the design of Central.

The State's expert witness in school administration and educational facility planning, Mr. Robert Black, testified that the Central design providing for 220 square feet per student was "intriguing" and that it "startled" him because he "had never had the opportunity to design a secondary school facility with square footage allowance anywhere close to that." (Tr. at 624-25). He continued by stating that "the square footage that is being planned for the building per student is extravagant, the most extravagant that I have ever encountered." (Tr. at 627). However, on cross-examination Mr. Black testified that of the school facilities with which he is familiar with the square footage per student, none had a natatorium with a 50 meter pool, an indoor track or racquetball courts and none had desegregation as the purpose of the program. (Tr. 639-41). As a result of the inclusion of such athletic facilities in the Central design, the square footage per student will be greater than in a traditional school without such facilities. However, the athletic facilities in the Central design are necessary to implement the Classical Greek Magnet program and to provide desegregative attractiveness. Addition-

ally, the Computers Unlimited and Classical Greek Magnet programs academic requirements necessitate more square footage per student than a traditional academic program. In the Computers Unlimited program classrooms, the student computer terminals are arranged around the perimeter of the room with traditional classroom seating in the middle of the room. (Tr. at 50). Although this arrangement requires classrooms to be larger, it allows the teacher to see all the computer screens, prevents computer terminals from dominating the classrooms, allows some students to work at the computers while others are working in the traditional classroom, and makes it easier to get electricity to the computers. (Tr. at 50-51). Space must also be allocated to house a mainframe computer. The Classical Greek program requires a 300 seat auditorium that increases the square footage per student. However, the auditorium is necessary to the program and can also double as a lecture hall. (Tr. at 45). The Court is convinced that the square footage per student in the Central Design is necessary to implement the Computers Unlimited and Classical Greek Magnet programs and to achieve desegregative attractiveness.

Although the Central design is more extensive than any other high school in the Kansas City area, such facilities are necessary to attract non-minority suburban students to the inner city to accomplish the difficult task of desegregating Central High School. (Tr. at 89-90). The magnet programs could not be successfully implemented in a lesser facility, and therefore, the KCMSD seeks to increase the budget, not reduce the Central design. (Tr. at 216, 227). Prior to its request to increase the budget, the KCMSD deleted from the Central design facilities such as a dance room, broadcast booth, outdoor stadium, film editing facility, music facilities and art labs. (Tr. at 228-29). Although the architects and the educators believed that the original budget was inadequate, the Project Management Team directed them to try and meet the original budget approved by the Court. (Tr. at 302-05). Value engineering was employed in an

attempt to reduce the cost of the facility. (Tr. at 308-09). Additionally, the original budget omitted costs of architects' and engineers' fees, advertising, soil surveys and testing, furniture and construction contingencies. (Tr. at 310-11, 574-77). The original budget also assumed a net space to gross space efficiency ratio of 85%, while a 75% ratio is usual for school buildings (Tr. at 312). The new budget assumes a 72% ratio for Central design. (Tr. at 322-23). Finally, the original budget assumed that the area inside the indoor track could be used for enclosed athletic areas. (Tr. at 314). However, it was determined that such a design was inappropriate for an educational facility, thereby resulting in an increase of square footage in the new budget. (Tr. at 314-15). Mr. Maher, a witness for the State, testified that personnel is the key to running a successful magnet program and that a good facility and equipment is attractive in hiring the best personnel. (Tr. at 467, 488-89). Mr. Maher even admitted that the concept of Central High School is an outstanding model program and that it could be successful to desegregate. (Tr. at 501). Therefore, the Court will grant the KCMSD's motion for an increase in the Central High School construction budget with the deletion of the 10 meter diving platform.

The KCMSD's motion also seeks approval of a Central High School site preparation and acquisition budget of $7,010,166. The LRMP and LRCIP call for Computers Unlimited and Classical Greek Magnet programs for 700 students in each program in grades 9-12 in a new Central High School facility. The existing site consists of 14.5 acres, while an optimum site for the magnet programs would consist of 35 acres. Final Site Report for Central High School at 1. The site expansion alternative selected consists of the existing Central site plus a city park bounded by 31st Street, Linwood Boulevard and vacated right-of-ways for Bales and Askew Streets and the acquisition of 8.4 acres of private property for a total site of 32.2 acres. *Id.* at 2, 3, 5. The KCMSD would enter into a cooperation

agreement with the City of Kansas City permitting the use of the city park land for construction of athletic facilities and requiring the KCMSD to obtain land adjacent to the park for relocation of park facilities. *See id.* at 87-98. Projected site acquisition and preparation costs are set forth below:

Land acquisition	$ 1,933,937
Relocation	369,650
Appraisals	46,500
Title searches and surveys	74,500
Demolition and site preparation	4,392,579
Land cost contingency	193,000
	$ 7,010,166

No party opposed the proposed site acquisition and preparation budget for Central. The Court has reviewed the Final Site Report for Central High School. The Court notes that the site selected will result in the displacement of 13 residential homes and 17 commercial businesses. *Id.* at 5. However, the site selected results in much less residential displacement than other alternatives. *Id.* The site provides good after-hours supervision. *Id.* Additionally, the site selected results in a substantial cost savings over other alternatives, *id.* at 13, and the Court notes that the public expressed strong support for the site alternative selected as well as the site layout, *id.* at 8. The Court will approve the site acquisition and preparation budget for Central High School as set forth above.

The KCMSD's motion requests an increase of $1,739,077 in the equipment budget for Central and realignment of the budget years in which equipment expenditures will be made. The equipment budgets in the LRMP were estimates based on projected needs. After planning the equipment purchases for the Central Computers Unlimited program, it was determined that an increase of $1,739,077 was needed in the equipment budget as follows:

	1987-88	1988-89	1989-90	1990-91	1991-92
LRMP Funding	$ 500,000	$250,000	$ 200,000	$150,000	$100,000
Requested Funding	$1,517,660	$108,525	$1,065,443	$128,925	$118,524

Mr. Rainwater testified that the increased equipment budget was necessary because the original equipment budget was insufficient to meet the requirements set forth in the Hunter specifications and the LRMP. (Tr. at 101-04. No party opposed the KCMSD's motion. The KCMSD's request for an increased equipment budget for the Central Computers Unlimited program will be granted as set forth above. The KCMSD also requests a realignment of the Central Classical Greek program equipment budget. No increase in the budget is requested. The requested budget realignment is set forth below:

	1989-90	1990-91	1991-92
LRMP Funding	$ - 0 -	$200,000	$150,000
Requested Funding	$350,000	$ - 0 -	$ - 0 -

Mr. Rainwater testified that the budget realignment is necessary so the Central facility will be fully equipped when the program is ready to move into it, thereby enhancing student recruitment (Tr. at 100-01). No party opposed the KCMSD's request. The KCMSD's request for a realignment of the equipment budget for the Central Classical Greek program will be granted as set forth above.

The costs associated with the Central construction and site acquisition and preparation budgets approved previously in this

order shall be allocated equally between the State and the KCMSD with joint and several liability. The costs associated with the Central equipment budgets approved previously in this order shall be allocated 75% to the State and 25% to the KCMSD with joint and several liability. If the construction, site acquisition and preparation, or equipment costs exceed the budgets approved for Central by more than 10%, the KCMSD is directed to seek approval of the Court for the increased expenditure.

Accordingly, it is hereby

ORDERED that the KCMSD's motion for approval of a site for Central High School and for increases and modifications in the budgets for building construction and equipment for the magnet programs is granted as set forth in this order; and it is further

ORDERED that the costs associated with the Central High School construction and site acquisition and preparation budgets approved in this order shall be allocated equally between the State and the KCMSD with joint and several liability; and it is further

ORDERED that the costs associated with the Central High School equipment budgets approved in this order shall be allocated 75% to the Stte and 25% to the KCMSD with joint and several liability; and it is further

ORDERED that the KCMSD shall seek Court approval for any construction, site acquisition and preparation, or equipment costs for Central High School exceeding the budgets approved in this order by more than 10%.

/s/ RUSSELL G. CLARK
DISTRICT JUDGE
UNITED STATES
DISTRICT COURT

Dated: April 20, 1989

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, et al.,
Plaintiffs,

vs.

STATE OF MISSOURI, et al.,
Defendants.

Filed: May 5, 1989

ORDER

Before the Court is the KCMSD's motion for increased funding for CIP asbestos abatement costs. The State of Missouri filed a response. The KCMSD's motion will be granted as set forth in this order.

The KCMSD filed a motion for increased funding for CIP asbestos abatement costs. The KCMSD seeks an order: (1) approving additional funding of $910,224 for asbestos abatement required as part of construction pursuant to the Long Range Capital Improvement Plan ("LRCIP") to be paid 100% by the State; (2) establishing guidelines for asbestos abatement for the remainder of the LRCIP in conformity with the federal Asbestos Hazard and Emergency Response Act of 1986 ("AHERA"); and (3) authorizing the KCMSD to proceed with asbestos abatement work for all existing schools designated for use as part of the LRCIP with asbestos removal being funded equally by the KCMSD and the State. the KCMSD states that all asbestos abatement work for the LRCIP Phase III facilities has been completed at a cost of $910,224 in excess of the original estimate

of $37,885. The KCMSD attributes this budget overrun to inspections that did not reveal the full extent of the presence of asbestos in the KCMSD facilities and stringent guidelines for regulation of asbestos removal and abatement in school buildings contained in the AHERA. Pursuant to the allocation of funding previously approved by the Court for Phase III of the LRCIP, the KCMSD requests that the additional asbestos abatement costs be borne 100% by the State. Additionally, the KCMSD seeks Court approval of use of the AHERA regulations as guidelines for the asbestos abatement process and to proceed with asbestos abatement of all buildings scheduled for use in the LRCIP with the cost of such abatement to be shared equally between the State and the KCMSD. Finally, in a footnote, the KCMSD requests that its share of additional funding for the asbestos abatement overruns be provided from the desegregation program budget because the increased costs for asbestos abatement were not included in the $150 million capital improvement bonds issue authorized by the Court. *See* KCMSD Motion for Increased Funding for CIP Asbestos Abatement Costs at 5 n.1. The State counters that asbestos abatement is not a desegregation expense because the KCMSD would have had to remove the asbestos from schools even if the remedial plan did not exist. The State argues that even assuming asbestos abatement is a desegregation expense, the Eighth Circuit's order of August 19, 1988, requires the KCMSD to pay 100% of the asbestos abatement costs with funds from interest on the $150 million bond issue. *See Jenkins v. State of Missouri*, 855 F.2d 1295, 1306 (8th Cir. 1988). At the maximum, the State argues that the cost of asbestos abatement should be shared equally by the State and the KCMSD pursuant to this Court's order of September 15, 1987. The State continues by arguing that if asbestos abatement is a desegregation expense, it is a capital improvement and, therefore, the KCMSD's portion of the expense should be funded from the capital improvements budget. The State concludes by arguing that the KCMSD should be

ordered to pursue all claims it might have against other entities for asbestos abatement costs and all other funding sources for these costs. Additionally, the State requests the opportunity to conduct its own survey of KCMSD facilities and then file a supplemental response. The State's request for an opportunity to conduct a survey of KCMSD facilities and to file a supplemental response will be denied.

This Court has previously stated that "[t]he improvement of school facilities is an important factor in the overall success of this desegregation plan. Specifically, a school facility which presents safety and *health hazards* to its students and faculty serves both as an obstacle to education as well as to maintaining and attracting non-minority enrollment." *Jenkins v. State of Missouri*, 639 F. Supp. 19, 40 (W.D. Mo. 1985) (emphasis added). The Eighth Circuit stated that "[t]hese findings of the district court are sufficient to support its conclusion that capital improvements are necessary for successful desegregation," *Jenkins v. State of Missouri*, 807 F.2d 657, 6 85 (8th Cir. 1986), and that "[e]ven absent the finding that the State contributed to causing the decay, the capital improvements would still be required both to improve the education available to the victims of segregation as well as to attract whites to the schools," *Jenkins*, 855 F.2d at 1305. Therefore, the Court finds that asbestos abatement in the KCMSD schools to be renovated pursuant to the LRCIP is a proper desegregation expense and will approve additional funding of $910,224 for asbestos abatement.

Asbestos abatement is a capital improvement. This conclusion is supported by the Eighth Circuit's statement that "the capital improvements plan that we affirm today does not cover all expenditures that may be necessary between now and the 1991-92 school year, specifically some $16 million for land acquisition and *asbestos removal costs*." *Jenkins*, 855 F.2d at 1306 (emphasis added). Therefore, the KCMSD's share of the

asbestos abatement costs shall be funded from the capital improvements budget.

The State argues that the Eighth Circuit's order of August 19, 1988, requires the KCMSD to pay 100% of the asbestos abatement costs with funds from interest on the $150 million bond issue. The Court disagrees. The Eighth Circuit stated:

> [I]t is apparent that the capital improvements plan that we affirm today does not cover all expenditures that may be necessary between now and the 1991-92 school year, specifically some $16 million for land acquisition and asbestos removal costs. We are informed by the post-argument filings that KCMSD's bond issue has been sold, and that the net proceeds are in the hands of the district. Presumably, these funds will produce substantial interest income before all will be expended in the renovation and construction program.

Id. Although the Eighth Circuit indicates that interest income from the capital improvement bonds will be available to pay desegregation expenses, such as land acquisition and asbestos removal costs, the Eighth Circuit did not require the KCMSD to pay 100% of the asbestos abatement costs with funds from interest on the bond issue. The KCMSD argues that the State should bear 100% of the additional asbestos abatement costs pursuant to this Court's order of June 16, 1986. However, the State counters that the additional asbestos abatement costs should be allocated equally between the State and the KCMSD pursuant to this Court's order of September 15, 1987. The additional asbestos abatement costs approved in this order shall be allocated equally between the State and the KCMSD with joint and several liability. Additionally, the Court encourages the KCMSD to pursue all claims it might have against other entities for asbestos abatement costs and to pursue any other funds that might be available for asbestos removal.

The Court will approve the use of the AHERA regulations as guidelines for the asbestos abatement process and will also approve proceeding with asbestos abatement of all facilities scheduled for use under the LRCIP with the cost of abatement to be shared equally between the State and the KCMSD with joint and and several liability. Accordingly, it is hereby

ORDERED that the KCMSD's motion for increased funding for CIP asbestos abatement costs is granted as set forth in this order; and it is further

ORDERED that the costs associated with the asbestos abatement shall be allocated equally between the State and the KCMSD with joint and several liability; and it is further

ORDERED that the Court approves the use of the AHERA regulations as guidelines for the asbestos abatement process; and it is further

ORDERED that the Court approves asbestos abatement for all facilities scheduled for use under the LRCIP with the costs of abatement to be shared equally between the State and the KCMSD with joint and several liability.

/s/ RUSSELL G. CLARK
DISTRICT JUDGE
UNITED STATES
DISTRICT COURT

Dated: May 5, 1989

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, *et al.*,
Plaintiffs,

vs.

STATE OF MISSOURI, *et al.*,
Defendants.

ORDER
[Filed Nov. 12, 1986]

On June 16, 1986, this Court directed the Kansas City, Missouri School District (KCMSD) to submit a proposal for a comprehensive magnet school program by August 1, 1986. The KCMSD filed its proposal on August 13, 1986 along with its motion requesting approval and funding of the plan. The Court conducted hearings on KCMSD's motion during the week of September 15, 1986 and again on October 9 and 10, 1986. After careful consideration of the evidence presented, the Court will grant the motion in part and deny it in part. The Court will order implementation of the magnet plan as submitted and will approve the proposed budget to fund the plan. The Court will approve the capital improvements and new construction requested for magnet schools at the cost estimated by the KCMSD. The Court will find the State of Missouri and the KCMSD jointly

and severally for approximately $53,000,000 of the estimated $143,000,000 budget approved for implementation of the magnet school plan. The State of Missouri will be solely liable for the remaining costs of the implementation. The Court will find the State of Missouri and the KCMSD jointly and severally liable for costs of the capital improvements and new construction estimated at $53,000,000.

Magnet School Plan

The Court requested the KCMSD to submit a comprehensive magnet school proposal for consideration as part of the Court's overall plan to eliminate the vestiges of unlawful segregation in the KCMSD and to avoid future constitutional violations. The implementation of magnet schools as a tool to desegregate is within the equitable powers of a Court in fashioning a remedy in a school desegregation case. In its order dated June 14, 1985, the Court reviewed these equitable powers and will not do so here. In response to the Court's request, the KCMSD submitted a long-term magnet school plan that was the product of extensive research, experience and planning of nationally respected experts on magnet schools. The plan proposes that every senior high school, every middle school, and approximately one-half of the elementary schools in the KCMSD will become magnet schools by the school year 1991-92. The plan proposes numerous magnet themes ranging from foreign languages to performing arts to science and math. Each magnet school would, however, retain the basic academic curriculum offered in the district.

The State of Missouri contends that the proposed magnet plan was hastily drafted and that it magnetizes too many schools over too short a time period. The State suggests that magnet schools would be implemented more gradually, based upon the experience of earlier schools. While the Court is mindful of the State's position, it is convinced that the students who are presently

enrolled in the KCMSD are entitled to a vindication of past denial of constitutional rights now.

The Court finds that the proposed plan would serve the objectives of its overall desegregation program. First, the carefully chosen magnet themes would provide a greater educational opportunity to *all* KCMSD students. The plan magnetizes such a large number of schools that every high school and middle school student will attend a magnet school. At the elementary level, there would be a sufficient number of magnets to permit every student desiring to attend a magnet school to do so. The Court is opposed to magnetizing only a limited number of schools in a district even though such plans have been approved by the Eighth Circuit Court of Appeals and the United States Supreme Court. The philosophy of a magnet school is to attract non-minority students into a school which is predominantly minority. It does so by offering a higher quality of education than the schools which are being attended by the non-minority students. In each school there is a limitation as to the number of students who may be enrolled. Thus, for each non-minority student who enrolls in the magnet school a minority student, who has been the victim of past discrimination, is denied admittance. While these plans may achieve a better racial mix in those few schools, the victims of racial segregation are denied the educational opportunity available to only those students enrolled in the few magnet schools. This results in a school system of two-tiers as it relates to the quality of education. This inequity is avoided by the KCMSD magnet school plan.

The Court also finds that the proposed magnet plan would generate voluntary student transfers resulting in greater desegregation in the district schools. The suggested magnet themes include those which rated high in the Court ordered surveys and themes that have been successful in other cities. Therefore, the plan would provide both minority and non-minority district students with many incentives to leave their neighborhoods and

enroll in the magnet schools offering the distinctive themes of interest to them. Most importantly, the Court believes that the proposed magnet plan is so attractive that it would draw non-minority students from the private schools who have abandoned or avoided the KCMSD, and draw in additional non-minority students from the suburbs.

The KCMSD proposed a budget of $142,736,025 for implementation of its comprehensive magnet school plan over a six-year period. See Attachment A.[*] The KCMSD admits that the proposed budget consists of studied estimates which would be adjusted as actual costs are ascertained. While the resources requested are substantial, the constitutional violations committed were also substantial. The Court has carefully reviewed the proposed budget and finds that the estimated costs are reasonable. The long-term benefit to all KCMSD students of a greater educational opportunity in an integrated environment is worthy of such an investment.

For the reasons stated, the Court orders the implementation of the proposed magnet school plan as a fundamental component of its overall desegregation remedy and approves the budget at the cost estimated by the KCMSD.

Capital Facilities Program

The KCMSD also requests approval and funding of capital improvements to eleven of the district schools that it proposes to become magnets in September 1987, and for the construction of four new school facilities to be used as magnets beginning September 1988. The specific schools and the cost estimates for

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[* Attachments A and B to this opinion are not included in this Appendix. Ten copies of each attachment have instead been lodged with the Clerk of this Court.]

the work requested are listed in Attachment B. In response to KCMSD's request, the State of Missouri argues that the present condition of the district school facilities is not traceable to unlawful segregation but is due to a lack of maintenance by the KCMSD. The Court finds that even if the State by its constitutional violations and subsequent failure to affirmatively act to remove the vestiges of the dual school system did not directly cause the deterioration of the school facilities, it certainly contributed to, if not precipitated, an atmosphere which prevented the KCMSD from raising the necessary funds to maintain its schools. Furthermore, the capital facilities program requested by the KCMSD is a proper remedy through which to remove the vestiges of racial segregation, and is needed to attract non-minority students back to the KCMSD.

The KCMSD proposed a budget of $52,858,301 for the capital improvements to the eleven existing schools and the construction of four new facilities. The budget consists of studied estimates which would be adjusted as actual costs are ascertained. After careful consideration of the capital facilities work requested, the Court finds that the estimated costs are reasonable.

For the reasons stated, this Court orders that the requested capital improvements be made to the eleven existing schools and that four new facilities be construed at the costs estimated by the KCMSD. The Court orders that sites be acquired for Central High School, New Paseo Middle School, and New West Elementary School. The Court approves the rehabilitation of the Jewish Community Center or a comparable facility for use as a performing arts school in 1987-88 until the New Paseo Middle School is constructed.

In its motion filed August 13, 1986, the KCMSD also requested that the State of Missouri be required to fund the construction of the New Northeast and New Southeast Elemen-

tary Schools, and site expansions to facilitate magnet themes at Pitcher Elementary, Garfield Elementary, Northeast Middle School, Central Senior high School, and East Senior High School. The Court denies these requests at this time because these magnet programs are not scheduled for implementation before 1989-90.

Funding

In its order of September 17, 1984, this Court found that the State of Missouri and the KCMSD had violated the constitutional rights of the plaintiffs. To date, the State of Missouri has borne most of the costs of the Court's overall plan to remove the vestiges of unconstitutional segregation from the KCMSD. This was based on the Court's earlier determination that the State had the "primary responsibility for insuring that the public education systems in the State comport with the United States Constitution." *Jenkins v. State of Missouri*, 593 F. Supp. 1485, 1506 (W.D. Mo. 1984). The KCMSD, which includes its citizens, must be called to help remedy the conditions for which it is partially responsible. Accordingly, the Court orders that the KCMSD and the State of Missouri are jointly and severally liable for the cost of the capital facilities program estimated at $52,858,301. The KCMSD and the State of MIssouri are also jointly and severally liable for the cost of site acquisitions for Central High School, New Paseo Middle School, New West Elementary School and the cost of rehabilitation of the Jewish Community Center or a comparable facility for use as a performing arts magnet in 1987-88. These costs were not included in the KCMSD's capital facilities estimate.

It is further ordered that the KCMSD and the State of Missouri are jointly and severally liable for the following costs of the implementation of the magnet school plan approved by the Court:

$8,316,272 in 1986-87
$8,908,406 in 1987-88
$8,908,406 in 1988-89
$8,908,406 in 1989-90
$8,908,406 in 1990-91
$8,908,406 in 1991-92

The result is that the KCMSD and the State of Missouri are jointly and severally liable for $52,858,301 of the $142,736,025 that the KCMSD estimates is required to implement its magnet school plan. The Court further orders that the State of Missouri is solely liable for the balance of the costs of implementation, or $89,877,724.

All judgment amounts are based upon studied estimates provided by the KCMSD and may be adjusted when the actual costs of the capital facilities work and the magnet school plan ordered by the Court are ascertained. The State of Missouri will not be permitted to withhold foundation formula payments or state transportation funds due the KCMSD in order to recover any contribution for money paid by the State on the joint and several judgments.

The Court is aware that the magnet plan will require a more extensive program for the transportation of students than presently exists. The KCMSD has not submitted a budget for the actual cost of transportation required by the plan claiming the costs cannot be predicted with accuracy until the District gains experience in determining from where the students attending the particular magnet schools will come. The Court will defer its assessment as to the extent of the need for transportation and the liability for the cost of same until such time as realistic estimates for the needs and cost are available. The KCMSD is ordered to provide this Court with estimated costs of the transportation required for implementation of the plan in 1987-88 on or before August 15, 1987.

The KCMSD may extinguish its liability for the $52,858,301 portion of the implementation cost of the magnet school plan by passing a $53,000,000 school capital improvement bond issue. If this should occur, the State of Missouri would no longer be liable for the $52,858,301 in capital facilities work ordered by the Court.

The Court also wishes to point out that during the course of this lawsuit the Court has not been informed of one affirmative act voluntarily taken by the Executive Department of the State of Missouri or the Missouri General Assembly to aid a school district that is involved in a desegregation program. By making approximately $105,000,000 of the judgments joint and several, the General Assembly may be encouraged to explore the possibility of enacting legislation that would permit a district involved in a desegregation plan more versatility than it presently has to raise funds with which to support the program.

For the reasons stated, it is hereby

ORDERED that the KCMSD's motion for approval of its long-range magnet school plan is granted in part and denied in part as set forth in this memorandum.

/s/ Russell G. Clark
RUSSELL G. CLARK
District Judge
United States District Court

Dated: November 12, 1986

APPENDIX F

United States Court of Appeals
for the Eighth Circuit

No. 90-2314

Kalima Jenkins, by her friend, Kamau Agyei; Carolyn Dawson, by her next friend, Richard Dawson; Tufanza A. Byrd, by her next friend, Teresa Byrd; Derek A. Dydell, by his next friend, Maurice Dydell; Terrance Cason, by his next friend, Antoria Cason; Jonathan Wiggins, by his next friend, Rosemary Jacobs Love; Kirk Allan Ward, by his next friend, Mary Ward; Robert M. Hall, by his next friend, Denise Hall; Dwayne A. Turrentine, by his next friend, Shelia Turrentine; Gregory A. Pugh, by his next friend, David Winters, on behalf of themselves and all others similarly situated;

Appellees,

American Federation of Teachers, Local 691,

Appellee,

v.

The State of Missouri; Honorable John Ashcroft, Governor of the State of Missouri;

Wendell Bailey, Treasurer of the State of Missouri;

Missouri State Board of Education
Roseann Bentley
Dr. Dan Blackwell
Rev. Raymond McCallister, Jr.
Susan D. Finke
Thomas R. Davis (Presiding)
Cynthia B. Thompson
Gary M. Cunningham

Members of the Missouri State Board of Education
Robert E. Bartman, Commissioner of Education of the State of Missouri,

Appellants,

and

School District of Kansas City, Missouri and Claude C. Perkins, Superintendent thereof,
Appellees.

Appeals from the United States District Court
or the Western District of Missouri.

Submitted: June 25, 1991
Filed: August 14, 1991

Before McMILLIAN, Circuit Judge, HEANEY, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

JOHN R. GIBSON, Circuit Judge.

Another appeal from the Kansas City, Missouri, School District desegregation remedy is now before us. The State appeals from a district court[1] order approving a contingency plan that modifies the magnet school admissions policy for the 1990-91 school year. The contingency plan temporarily allows deviation from the original Long-Range Magnet School Plan, which required that new magnet schools open with a student population that is 60% minority and 40% non-minority. The State argues that the district court erred or abused its discretion in adopting the contingency plan and in rejecting the State's two alternatives to the contingency plan. The State also argues that the contingency plan will result in the reestablishment of the racially identifiable

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[1] The Honorable Russell G. Clark, United States District Judge, Western District of Missouri.

schools, and thus, the court cannot require funding of certain components of the remedial plan. The State's arguments lack merit, and we affirm the district court order.

On June 14, 1985, the district court entered its first order for the desegregation of the Kansas City, Missouri, School District. *Jenkins v. Missouri*, 639 F. Supp. 19 (W.D. Mo. 1985), *aff'd as modified*, 807 F.2d 657 (8th Cir. 1986) (en banc), *cert. denied*, 484 U.S. 816 (1987). An important part of the district court remedy included the implementation of a magnet school program. *Id.* at 34-35. The KCMSD prepared and presented its Long-Range Magnet School Plan, which the district court approved on November 12, 1986. *Jenkins v. Missouri*, No. 77-0420-CV-W-4, slip op. at 4 (W.D. Mo. Nov. 12, 1986).

The Long-Range Magnet School Plan provided that all of the middle and high schools in the KCMSD become magnet schools in the 1990-91 school year. The Plan required that the district's new magnet schools open with a 60% minority and 40% non-minority student population. The Plan also required that existing schools that are converted to magnet schools reduce their minority percentage by 2% per year until the schools reach the 60%/40% goal.

As the 1990-91 school year approached, it became evident that the 60%/40% goal would not be reached and that if the goal were adhered to, all minority students could not be placed in the middle and high schools for the school year. KCMSD proposed a contingency plan providing for a temporary deviation from the 60%/40% racial admissions guidelines. The State objected to the KCMSD's contingency plan, arguing that the plan would lead to the reestablishment of racially segregated schools. The State suggested that instead of adopting the contingency plan proposed by the KCMSD, the KCMSD should either convert the failing magnet schools back to traditional schools to accommodate students who could not get into magnet schools without

upsetting the racial guideline, or open traditional schools annexes at the magnet schools for such students. Although the district court stated that it viewed the 60%/40% guidelines as a steadfast magnet school admissions requirement, it adopted the contingency plan as temporarily necessary under the circumstances and rejected the alternatives proposed by the State. *Jenkins v. Missouri*, No. 77-0420-CV-W-4, slip op. at 4 (W.D. Mo. July 3, 1990). The State appeals, arguing that the district court erred or abused its discretion in: (1) adopting the contingency plan because the plan will lead to the reestablishment of racially identifiable schools; (2) failing to accept its alternatives to the contingency plan; and (3) continuing to hold the State liable for the funding of remedial components in these circumstances.

Before we address the merits of the State's arguments, we note that we view the district court order in the context of the court crafting and managing a remedy for the failure of both the KCMSD and the State to eliminate vestiges of the dual school system lingering in the KCMSD. We need not, as we deal with each chapter of this ongoing and thoroughly litigated remedy, recite all of the details as to what has gone on before, but those who are interested may refer to *Jenkins v. Missouri*, 807 F.2d 657, 682-686 (8th Cir. 1986) (en banc) (*Jenkins I*), *cert. denied*, 484 U.S. 816 (1987), *Jenkins v. Missouri*, 855 F.2d 1295 (8th Cir. 1988) (*Jenkins II*), *aff'd in part and rev'd in part*, 110 S. Ct. 1651 (1990), *Jenkins v. Missouri*, 890 F.2d 65 (8th Cir. 1989) (*Jenkins III*), and *Jenkins v. Missouri*, 931 F.2d 470 (8th Cir. 1991) (*Jenkins IV*).

I.

The State first argues that the district court abused its discretion or otherwise erred in failing to consider, credit, or properly weigh evidence that the adoption of the contingency plan would lead to the reestablishment of racially identifiable schools.

The district court has broad discretion over the implementation of its remedial orders. As we stated in *Jenkins IV*, "a federal court has 'inherent jurisdiction in the exercise of its equitable discretion and subject to appropriate appellate review to vacate or modify its injunctions.' " 931 F.2d at 482 (quoting *Booker v. Special School Dist. No. 1*, 585 F.2d 347, 352 (8th Cir. 1978), *cert. denied*, 443 U.S. 915 (1979)). School desegregation plans are particularly likely to need adjustment. As the Supreme Court has observed in such cases: " '[E]quity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs.' " *Milliken v. Bradley*, 433 U.S. 267, 288 (1977) (*Milliken II*) (quoting *Brown v. Board of Educ.*, 349 U.S. 294, 300 (1955)). The Fifth Circuit recently cited with approval a treatise that stated: " '[A] court must continually be willing to redraft the order at the request of the party who obtained equitable relief in order to insure that the decree accomplishes its intended result.' " *United States v. Lawrence County School Dist.*, 799 F.2d 1031, 1046 (5th Cir. 1986) (quoting 11 C. Wright & A. Miller, *Federal Practice and Procedure*, § 2961 at 599 (1973)).

The State argues that the district court erred or abused its discretion in rejecting the testimony of its expert witnesses who testified about the phenomenon of "tipping." The experts testified that if a minority population at a school reaches a certain level, non-minority students will leave and the school will become all-minority or nearly all-minority, and that this phenomenon is described as "tipping."

The State presented affidavits from Joan Solomon, Director of Urban Education for the State of Missouri, who had been the State's representative to several committees in the St. Louis desegregation case, and Fred Linhardt, Director of Vocational Planning and Evaluation for the Department of Elementary and Secondary Education for the State of Missouri, also a member of one of the committees in the St. Louis case. Solomon testified

in her affidavit that "any increase in minority percentage over 60% in Kansas City's magnet schools could well make it significantly more difficult to attract non-minority students to the schools, and to retain present non-minority students" Likewise, Linhardt testified that in his experience it was difficult to attract and retain non-minority students in primarily minority schools, and that he had witnessed tipping in public vocational high schools in St. Louis City and County. He also concluded that increasing the minority percentage in the magnet schools above 60% "could well make it significantly more difficult" to attract and retain non-minority students.

The State argues that its evidence regarding tipping was uncontroverted as KCMSD presented no affidavits, declarations, or documents saying that tipping would not be a problem in the magnet schools. The State also points to decisions of various other courts, as well as this court, recognizing the difficulties attendant to desegregation efforts when minority percentages in schools reach varying higher levels.[2] The district court answered the State's argument by concluding that "[t]he State has failed to provide support for its proposition that allowing the KCMSD to enroll more than 60% minority students in magnet schools would make it more difficult for the KCMSD to attract and retain non-minority students." Slip op. at 5 (July 3, 1990 order).

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[2] *Liddell v. Board of Educ.*, 469 F. Supp. 1304, 1327 (E.D. Mo. 1979), *rev'd on other grounds, Adams v. United States*, 620 F.2d 1277 (8th Cir.) (subsequent history omitted); *Liddell v. Missouri*, 731 F.2d 1294 (8th Cir.) (en banc), *cert. denied*, 469 U.S. 816 (1984); *Clark v. Board of Educ.*, 705 F.2d 265 (8th Cir. 1983); *Morgan v. Kerrigan*, 401 F. Supp. 216 (D. Mass. 1975), *aff'd*, 530 F.2d 401 (1st Cir.), *cert. denied, White v. Morgan*, 426 U.S. 935 (1976).

The State's argument on appeal is easily answered. The State's argument is based upon the assumption that its unopposed testimony has preclusive weight. In essence, the State's argument is that the district court judge, who has lived with this case since 1977, must give credit to the affidavits of two state employees with respect to the tipping phenomenon after problems have developed in the first few years of implementing a massive school desegregation plan. The State's argument ignores the district court's duty to make factual findings based on the evidence before it and, in doing so, the court's right to reject testimony that may be presented by either side.

A number of additional factors support our decision to reject the State's argument. First, at this point, KCMSD has only begun its vast efforts to remedy the vestiges of the dual system of education in the school district. Second, despite repeated urging by this court, as of yet, the parties have only been able to achieve a voluntary interdistrict transfer plan involving 10 KCMSD students attending an elementary school in Missouri City. It is evident that utilizing a voluntary interdistrict transfer plan would ease the task of increasing the non-minority enrollment percentage in the KCMSD. Third, although the progress to date has been excruciatingly slow, the record demonstrates that progress has occurred, and the State's assumption that the plan is a failure is premature, to say the least. The KCMSD enrollment figures indicate that in the 1987-88 school year, KCMSD placed approximately 140 new non-minority students in the magnet schools; in 1988-89, 300; in 1989-90, 517; and in 1990-91, 654. Moreover, many schools with a high percentage of minority students have, in fact, been successful in attracting non-minority students. For example, Central Middle School, which was nearly 100% minority, now has a 24% non-minority enrollment. In addition, Pinkerton Latin Grammar Elementary, Knotts Environmental Science Elementary, and Faxon Elementary have made similar progress in increasing their non-minority student population.

Under these circumstances, we cannot conclude that the district court erred or abused its discretion in adopting the contingency plan.

II.

The State next argues that the district court erred in failing to accept either of its two alternatives to the contingency plan and in concluding that the State had failed to present a viable solution to the potential problems of student placement for the 1990-91 school year. Specifically, the State suggested that instead of modifying the 60%/40% guidelines, the KCMSD should either "de-magnetize" certain magnet schools that had been unsuccessful in attracting non-minority students and open these as traditional schools to students not admitted to magnet schools, or create traditional school annexes at the existing magnet schools for the temporary use by students whom the KCMSD could not serve consistently with the 60%/40% guidelines. Along similar lines, the State argues that if the KCMSD is allowed to abandon the goal of numerical integration, then the court should not require the State or the KCMSD's patrons to fund remedial components that have as their sole or principal justification the attraction of non-minority students from the suburban and private schools.

The district court rejected the State's alternatives because it concluded that either suggestion would re-create totally segregated schools in the KCMSD. Slip op. at 5 (July 3, 1990). It stated: "The State's assumption that some magnet schools are failing is premature, as the [Long Range Magnet Plan] has not been fully implemented." *Id.*

The district court did not err in rejecting the State's alternatives and continuing to hold the State responsible for funding of the remedial plan. The most obvious shortcoming of the State's arguments is that the arguments are directed solely to the

KCMSD's progress in attracting non-minority students to the magnet schools and do not consider any of the district court's findings concerning the past segregation in the KCMSD or the causes and effects of that segregation. In *Jenkins II*, we pointed to district court findings that segregation has caused a system-wide reduction in student achievement in the KCMSD schools, 855 F.2d at 1300 (citing *Jenkins* 639 F. Supp. at 24), that segregation in KCMSD had caused the departure of whites in the system to private and suburban schools, *id.* (citing slip op. at 1-2 (August 26, 1986)), and that " '[KCMSD's] physical facilities have literally rotted' ", *Id.* (quoting *Jenkins v. Missouri*, 672 F. Supp. 400, 411 (W.D. Mo. 1987)). We affirmed the remedial orders entered by the district court stating: "The foundation of the plan adopted was the idea that improving the KCMSD as a system would at the same time compensate the blacks for the education they had been denied and attract whites from within and without the KCMSD to formerly black schools." *Id.* at 1301. We affirmed the magnet school program as an integral part of the remedy with the goals of improving the education provided to all KCMSD students and attracting non-minority students back to the KCMSD schools. *Id.* at 1301-02. We further concluded that a substantial capital improvement plan would be required to achieve these goals. *Id.* at 1304-05.

As we have made abundantly clear, the purpose of the remedy in this litigation is at least two-fold: First, to remedy the deprivation of education opportunities to children in the KCMSD, and second, to attract non-minority students to the school district. As we reiterated in *Jenkins II*, the long term goal of the district court's effort was:

> to make available to *all* KCMSD students educational opportunities equal to or greater than those presently available in the average Kansas City, Missouri, metropolitan suburban school district. *In achieving this goal the victims of unconstitutional segregation will be restored to the*

> *position they would have occupied absent such conduct, while establishing an environment designed to maintain and attract non-minority enrollment.*

855 F.2d at 1301-02 (citing slip op. at 17 (June 16, 1986)) (emphasis added in 855 F.2d at 1301-1302).

The State's arguments simply ignore the goals of the district court remedial orders that have been amply discussed and approved by this court. Improving educational opportunities and attempting to attract non-minority students, whether from private schools or schools outside the district, present difficult management tasks. That effort is now in mid-stream. Under these circumstances, we are particularly mindful of the difficulty faced by the district court judge. We see no abuse of discretion in the orders entered in this case, no legal error, and insofar as the findings are based upon findings of fact, no findings of fact that are clearly erroneous.

The corollary to the State's argument is that if the integration goals are not achieved, KCMSD should simply reestablish what the district court termed "the recreation of totally segregated schools in the KCMSD." Slip op. at 5 (July 3, 1990). The district court did not err when it concluded that the State's alternatives would re-create segregated schools. The State's argument does not otherwise deserve further response.

It must be remembered that the district court issued its magnet school order on November 12, 1986. This court decided the appeal of that order and others on August 19, 1988. *Jenkins II*, 855 F.2d at 1296. Implementation of the magnet school orders has been slow. Part of the reason for the slow progress is the enormity of the task of remedying constitutional wrongs that had a tremendous impact in the Kansas City area. Implementation of the plan is requiring a considerable expenditure of funds to build new facilities and to develop plans for ambitious educational programs. It must also be said that in all likelihood, part of the

reason for the slow pace is the fact that the State or a group of citizens has vigorously challenged and appealed every step and turn in implementing the desegregation plan. Exclusive of disputes on attorneys' fees, this is the twentieth appeal since our first order approving the intradistrict desegregation plan. At the time the parties argued this case, four other cases were argued, and we have ascertained since argument that four more appeals have been filed. It is to be expected that an issue of this kind will, after the first litigation, produce other contested issues. On the other hand, there is a unique irony in this situation in which one of the parties substantially contributing to the protracted litigation presents an argument that because there has not been immediate success, the plan should be scrapped.

The beneficiaries of the desegregation plan are the children of the Kansas City, Missouri, School District. The programs being developed in the district are proving to be of interest to an increasingly larger group of non-minority students who had been enrolled in suburban districts and private schools and must be given a chance to work.

The *Jenkins* group has argued that the issues in this appeal are moot. Without extended discussion, we conclude that the issues are capable of repetition. Indeed, the records of this court reflect that the State has filed another appeal from a similar order with respect to the 1991-92 school year. This satisfies us that we need not stay our hand because of mootness.

Finally, a brief has also been filed for a group of *amici curiae* arguing that they may be precluded from attending the KCMSD school of their choice in the future as a result of the magnet school admissions racial quota policy. It is evident from the contingency plan adopted that efforts are being made to ensure that minority school children will be able to attend magnet schools. Indeed, that is the very intent of the contingency plan. We, therefore, reject the arguments put forth by amici.

We affirm the district court's order.

A true copy.

Attest: /s/ Michael E. Gans

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No. 91-324

In The

Supreme Court of the United States

October Term, 1991

STATE OF MISSOURI, *et al.*,

Petitioners,

v.

KALIMA JENKINS, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF RESPONDENTS JENKINS, *ET AL.* IN OPPOSITION TO CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether, having found that capital improvements were critical to the success of a school desegregation plan, the courts below erred in requiring the culpable parties to carry out those improvements in compliance with applicable provisions of the Asbestos Hazard and Emergency Response Act, 15 U.S.C. §§ 2641-2654 (1988).

2. Whether, having found that construction of a new high school was critical to the success of the school desegregation plan, the courts below erred in approving adjustments to the budget for the school.

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No. 91-324

In The

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Petitioners,

v.

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF RESPONDENTS JENKINS, *ET AL.* IN OPPOSITION TO CERTIORARI

COUNTER-STATEMENT OF THE CASE

A. Introduction

Petitioners, officials of the State of Missouri, invite this Court, on the narrowest of questions, to review broadly a school desegregation remedy alleged to be excessive. Understandably, petitioners fail to reveal the expansive nature and scope of their violations, which required both the narrow aspects of the remedy that are actually before the Court and the remedy as a whole. Because this Court has never reviewed the violations,[1]

[1] Nor has the Court reviewed the remedy in this case. Previously, this Court has declined to review the school-

and because "the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation[s]," *Milliken v. Bradley*, 433 U.S. 267, 280 (1977), respondent schoolchildren briefly recount the lower courts' violation findings and the extensive record evidence supporting them.[2]

B. Overview of the District Court's Findings

Prior to 1954 Missouri mandated racially segregated schools. The district court found that every "school district in Missouri participated in this dual system," and that intentionally segregated "access" to schools and particularly school districts had the effect of concentrating blacks within the Kansas City, Missouri School District ("KCMSD"). 593 F.Supp. at 1490. The court further found that Missouri's continuing segregation of schools in the decade after 1954 "led to white flight from the KCMSD to suburban districts [of a] large number of students . . . and that it has caused a wide reduction in student achievement in the schools of KCMSD." Order, August 25, 1986, at 1-2. As a further result of Missouri's continuing segregation of blacks in KCMSD's inferior schools, and of the consequent refusal of white voters to support the district financially, the KCMSD's "physical facilities have literally rotted," and the "overall condition" of the

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children's petition seeking a broader, interdistrict remedy, *Jenkins v. Missouri*, 484 U.S. 816 (1987), and the State's petition seeking a narrower remedy, 490 U.S. 1034 (1989). This Court has reviewed issues of attorneys fees 491 U.S. 274 (1989) and funding of remedies, 110 S.Ct. 1651 (1990).

[2] In the course of its deliberations on violations and remedy, the district court heard evidence from more than 250 witnesses over 130 days, amassed a transcript exceeding 40,000 pages and received more than 50,000 pages of documentary evidence.

schools became so "generally depressing . . . [as to] adversely affect[] the learning environment." 672 F.Supp. at 411, 403.

These findings and the voluminous record evidence supporting them are discussed in more detail below.

C. Pre-1954 Violations

From 1865 through 1976 Missouri's constitution required "separate" schools for "children of African descent,"[3] and, from 1889 to 1954, the State enforced that provision with statutes making it a criminal offense for "any colored child to attend a white school."[4]

Missouri superimposed its dual schools on a vast and intensely fragmented system of individual school districts. Unlike other southern states that mandated segregation, Missouri did not have a small number of large, county-wide school districts. Instead, like most northern states, Missouri distributed its schoolchildren among a large number of small school districts – over 10,000 districts in 1900, and 8000 as late as 1948 (compared to 546 today). P.Ex. 212.

Because Missouri's black population before 1954 was widely dispersed among its many small school districts,[5]

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[3] Mo. Const. 1865, art. 9, § 2.

[4] 1889 Mo. Laws 226, expanded in 1909 Mo. Laws 770, 790, 820 to include even private schools. The history of Missouri's de jure school segregation appears in detail in the decision in *Adams v. United States*, 620 F.2d 1277 (8th Cir. 1977) to which the district court referred in making its violation findings, 593 F.Supp. at 1485.

[5] Before 1954, more than half the State's school-aged black children lived in 93 counties in each of which fewer than 1,000 black children were widely and thinly dispersed among the county's 60 to 100 school districts. P.Exs. 208, 210, 184, 184A.

the state's racial segregation requirements had a particularly strong residential effect on the state's black schoolchildren. In particular, most of Missouri's school districts reserved their single schoolhouses for whites and required black children to seek an education outside the district.[6] Because Missouri did not require school districts to educate blacks locally or to reimburse them for tuition and transportation expenses incurred in getting an education elsewhere,[7] black families with children typically had no choice but to move to the few urban districts in the state that provided black, as well as white, schools.[8]

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[6] In 1866, the state school superintendent reported that blacks "are so widely scattered that it is impossible to collect them in sufficient number to warrant the expense of a school." P.Ex. 208. In 1914, the superintendent reported that lack of schools for blacks was "driving these people to towns in order to educate their children." P.Ex. K28. In 1922, the superintendent reported "where there are fewer than fifteen [black] children in a district . . . the school board is not interested in assisting these negro children to get an education." P.Ex. K30.

[7] *Board of Educ. v. St. Louis*, 149 S.W.2d 878 (Mo. 1941) (school districts not required to pay for inter-county transfers).

[8] *Jenkins*, 593 F.Supp. at 1490. For example, in the three counties around the KCMSD, 55 school districts enumerated blacks but failed to provide any reimbursement for tuition and transportation before 1931, when one district started paying. Only one other district was making payments as of 1945, and even in 1953 only five districts made such reimbursements. During much of that time, the KCMSD tuition amounted to one-fourth of the income of an average black family. Tr. 4313-4, 5355-8. As a result, black families initially tried to collect subscriptions to operate private schools. That failing, black parents next tried to convey their children to KCMSD, at their own expense, by horse and buggy, taxis, public buses, hired hearses, and on trains or on foot along routes plied by school buses reserved for white children only. Eventually, many families boarded their children with relatives and strangers in the

Citing this and other evidence, the district court found "an inextricable connection between schools and housing in the Kansas City area." Because black " '[p]eople gravitate[d] toward school facilities,' " the " 'location of [black] schools influence[d] the patterns of residential development of [the] metropolitan area and ha[d] important impact on composition of inner city neighborhoods.' " 593 F.Supp. at 1491 and Order of June 5, 1984 at 101, quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 20-21 (1971). Between 1900 and 1954 the number and ratio of black families with school-children in the school districts surrounding the KCMSD declined precipitously. P.Ex. 53E. Although 21% of black students in the 3-county area lived outside the KCMSD in 1900, that proportion had fallen to 3% by 1954. *Id.* The district court found that access to schools was a "major factor" in causing blacks to move into the KCMSD.[9] "Undeniably," the district court found, "blacks moved" out of districts that did not "maintain the state-required

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KCMSD; broke their families into two households, mother and children in the KCMSD, father working back home; and in the end, gave up their jobs and homes and moved entire families to the KCMSD.

[9] 593 F.Supp. at 1490, citing Tr. 16693 (expert testimony that lack of schools for blacks prompted the "depletion of black people from surrounding towns" into Kansas City). An expert for the schoolchildren described the impact of Missouri's system of school segregation as a lost opportunity to take advantage of the naturally high degree of residential integration once characterizing the 3-county area. Tr. 14,805-6, 15,286-7. Missouri's demographer admitted that the "existence of a core of blacks caused by [governmental segregation] in the Kansas City area would have long lasting effects [because] . . . blacks tend to move short distances from the core . . . and in-migration [of blacks] tends to focus on that black core as a result of . . . informational networks." Tr. 22,076, 22,091.

separate schools [for blacks] . . . to districts, including the KCMSD, that provided black schools." 593 F.Supp. at 1490.

The district court found that the "intensity" of the "segregation" that resulted from state-mandated shifts in the black and white population in the Kansas City area "is demonstrated by the fact that the average black family [in Kansas City] lives in a census tract that is 85% black while the average white family [in the suburbs] lives in a census tract that is 99% white." 593 F.Supp. at 1491.

D. Post-1954 Violations

After ninety years of vigorous criminal and civil enforcement of school segregation prior to 1954, Missouri informed local school districts six weeks after *Brown v. Board of Educ.*, 347 U.S. 483 (1954), that they henceforth could make their own decisions about whether, where, and how to educate black students.[10]

The district court found that, notwithstanding the State's acknowledged ability throughout the period to "do something about this entire matter of having segregated schools in Missouri by requiring reorganization [of boundaries] where [segregation] occurs,"[11] the State

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[10] P.Ex. 2322. (June 30, 1954 opinion of the Missouri Attorney General informing districts that they "*may* . . . permit white and colored children to attend the same schools" but assuring them that it was up to them to decide "whether [they] *must* integrate").

[11] State education officials have long acknowledged the State's ability to solve the problem of its segregated schools. When a federal court ordered the consolidation of three small Missouri school districts as a remedy for unconstitutional school segregation in 1975, and members of the Missouri Gen-

procrastinated for exactly thirty years after Brown – until a desegregation order was entered – before taking any steps to desegregate the black children segregated within the KCMSD. 593 F.Supp. at 1505 (finding that Missouri "cannot defend its failure to affirmatively act to eliminate the structure and effects of its past dual system").

With the State Attorney General's authorization, and the State Board and Department of Education's knowledge and acquiescence, the KCMSD acted repeatedly during the twenty years following *Brown* to extend its dual system, eventually concentrating more black children in the district's expanding black core and causing white families to move from the area to all white attendance zones just inside or outside the KCMSD's boundaries.[12] KCMSD expanded the dual system of schools in the area

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eral Assembly inquired about the matter, Missouri's Commissioner of Education, in letters to state board of education members, noted:

> It is interesting that members of the General Assembly directly associated with this matter are just now getting involved. However, I guess I am not surprised because I know the General Assembly would like to stay out of this area of controversy altogether. I have tried to keep them out by saying to everyone involved that the Missouri General Assembly really cannot do anything about . . . [school segregation]. It is true that *the General Assembly could do something about this entire matter of having segregated schools in Missouri by requiring reorganization where it occurs but I doubt if we'll see that.*

P.Ex. 2463. (Emphasis supplied)

[12] In 1977, when this action was filed, 25 of the pre-1954 one race schools remained 90% or more of the same race and 80% of all blacks in Kansas City attended schools that were 90% or more black. *Jenkins*, 593 F.Supp. at 1492. In 1954 the KCMSD operated 14 schools for only blacks. At trial, in 1984, 24 schools had 90% or more black students. *Id.*

by several means: gerrymandering attendance zones;[13] turning schools from all-white to nearly all black in a single year;[14] explicitly segregating classrooms within potentially integrated schools;[15] letting whites in racially transitional schools transfer freely to all-white schools throughout the 1950s, 1960s, and early 1970s; repeatedly selecting segregative sites for new schools during the same period; racially targeting faculty assignments; and replacing math and science courses in previously all-white schools with courses, for example, in "janitorial services" for the black children newly segregated in those schools.[16] The district court found that the direct effects of branding black children as unfit classmates (or even recess- or lunch-mates), and making blacks' education

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[13] During one short span of time, the district gerrymandered school attendance boundaries over three hundred times, usually changing lines by only a block or two, to assure that the growing black population remained in all-black school attendance zones.

[14] Ex.K2; Stipulation of February 21, 1984 (by moving boundaries into the expanding black core ten or fifteen blocks and by inviting the remaining whites in the new attendance area to take advantage of the KCMSD's Liberal Transfer Policy to transfer to all-white schools, the district turned virtually all-white elementary schools into virtually all-black schools in a single year). Central High and Junior High Schools were the first secondary schools that the KCMSD's segregative policies tipped from all white in 1955 to 95%+ black by 1960. Ex.K2.

[15] 593 F.Supp. at 1494 (for years black schoolchildren in the 1960s walked to the overcrowded elementary school near their homes from where they and a black teacher were bused to an under-utilized white school where they were given their own all-black classroom and made to take their own separate recess and lunch periods).

[16] *Jenkins*, 593 F.Supp. at 1493-4. *See also* Tr. 7018-21, 7338-41, 8624-5, 8969-71, 9419-20; Stipulation 75 of February 21, 1984.

inferior were largely demographic: While blacks perforce remained in their own, expanding, neighborhoods in the core of KCMSD, the State's and KCMSD's violations "led to white flight from the KCMSD to suburban districts, [a] large number of students leaving the schools of Kansas City . . . "[17]

The district court also found that the racially restrictive covenants that Missouri enforced until five years after *Shelley v. Kraemer*, 334 U.S. 1 (1948), the racially segregated "dual housing market" that the State's housing and insurance agencies "encouraged,"[18] the State's explicitly racially segregated relocations of persons displaced by highways and urban renewal programs, the State's history of discriminatory actions in regard to schools, housing, marriages and other practices, and KCMSD's continuation of its segregative school policies in the 1950s, 1960s and 1970s with the State's blessing "created an atmosphere in which private white individuals could justify their bias . . . against blacks," thus encouraging racially discriminatory redlining, steering and blockbusting in insurance, real estate and banking and further steering blacks into the KCMSD and whites into outlying areas. 593 F.Supp. at 1503.

Among the effects of these violations that the district court found are the following: (i) Black children within the KCMSD were subjected to system-wide racial isolation of great "intensity." 593 F.Supp. at 1485 (rejecting Missouri's argument that factors other than schools caused the intense segregation). (ii) A "large number of

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[17] Order, August 25, 1986 at 1; Tr. 8715-6, 8721-30, 9228-32, 9235 (cited at 593 F.Supp. at 1494); Tr. 17,314-16 (admission by Missouri that KCMSD underwent rapid transformation as "whites fled the district").

[18] *Jenkins*, 593 F.Supp. at 1491, 1503.

[white] students" and their families fled the KCMSD for "suburban districts."[19] (iii) As "many residents of the KCMSD left the district and moved to the suburbs" with their children, the KCMSD was left with a white voting majority that was without children or was unsupportive of the district's mainly black student population and that for nearly two decades "refused to approve a tax levy increase and a bond issue." 672 F.Supp. at 412. (iv) These financial restrictions on the district led to "rotted" and "generally depressing" physical facilities. *Id.* at 403, 411. As the court of appeals noted:

> The findings of fact demonstrate a spiraling effect of white children leaving the KCMSD schools and KCMSD's white constituency withdrawing its financial support from the system. This process eventually caused the decay of KCMSD's school buildings, which in turn fed the cycle.

855 F.2d at 1305. (v) Throughout the 30 years after *Brown*, the educational achievement of black children suffered, as the "inferior education indigenous of the state-compelled dual school system caused" a "system wide reduction" in student achievement in the schools of the KCMSD, 593 F.Supp. at 1492, 639 F.Supp. at 24. As a result, the district's educational-quality rating from the State dropped to lowest in the area, and the district's ability to retain nonminority students declined further. 639 F.Supp. at 24, 26, 29.

Missouri did not appeal any of the district court's findings as to the nature and scope of its violations, nor did it appeal the findings of pervasive, system wide

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[19] Order, August 25, 1986, at 1-2. *See e.g.*, Tr. 12993-4, P.Ex. 53G, K.Ex.2 (nearly 15,000 whites left KCMSD schools in waves over 15 years as the defendants' violations spread through the school district).

demographic, physical, and educational effects caused by those violations.

Although the district court found that these findings added up to a history of constitutional violations with "intens[e]" segregative effects, it concluded that the innocence of the suburban school district defendants in causing the racial transformation of area schools and the absence of sufficient segregative effects in any particular district, aside from the KCMSD, precluded the inclusion of the suburban districts in an interdistrict remedy.[20] The district court thereupon ordered proposals for a remedy limited to the KCMSD, except insofar as voluntary measures might enable black children to attend school in the suburbs and enable suburban white children to attend magnet schools in the KCMSD at state expense.

D. The Ordered Remedies

As the district court began devising a remedy for the violations it had found, it laid out two legal standards that it would follow. It noted that "the scope of the

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[20] 593 F.Supp. at 1488 ("plaintiffs simply failed to show that those [suburban district] defendants had acted in a racially discriminatory manner that substantially caused racial segregation in another district"). In January, 1985 the schoolchildren and KCMSD submitted their first proposed remedy, a broad interdistrict consolidation plan, that would have created fully integrated schools at comparatively little cost to Missouri. KCMSD Plan For Remedying Vestiges of Segregated Public School System, docket no. 1046. The State did not support the proposal, and the district court declined to consider it, requiring instead the submission of plans that imposed no obligations upon surrounding school districts. Order, January 25, 1985. An equally divided en banc court of appeals affirmed, 807 F.2d 657 (8th Cir. 1986), and this Court denied the schoolchildren's petition for certiorari to review the denial of interdistrict relief. 484 U.S. 816 (1987).

remedy is determined by the nature and extent of the constitutional violation," and that the goal of a remedy is to prohibit new violations and eliminate the "vestiges of state imposed segregation." 639 F.Supp at 23 (citing *Milliken v. Bradley*, 418 U.S. 717, 744 (1974)). Missouri never challenged these principles in the district court, the court of appeals or this Court.

Rejecting the plaintiffs' requests for a remedy involving mandatory interdistrict busing and Missouri's suggestions that the remedy focus on busing children from one part of the 75-percent minority KCMSD district to another, the district court in 1985 ordered a plan aimed at achieving two goals: (i) removal of the educational deficits to which the State's intentional segregation had subjected the black children within the KCMSD and (ii) voluntary integration efforts aimed at reversing some of the racially segregative effects of the State's violations. 639 F.Supp. 19.[21]

In order to eliminate inferior schooling, the court directed the KCMSD to implement plans (i) to achieve a more satisfactory academic rating from the State by improving KCMSD libraries and reducing teaching loads, (ii) to institute early childhood and remedial summer school programs, and (iii) to undertake the capital improvements necessary to assure that these educational programs operated in adequate buildings. The court found that such measures were necessary to "restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Id.* at 23.

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[21] Two consecutive orders are reported together at 639 F.Supp. 19. The initial remedy order of June 14, 1985 appears at 639 F.Supp. 19-46, *aff'd*, 807 F.2d 657 (8th Cir. 1986), *cert. denied* 484 U.S. 816 (1987). The order on pending motions of June 16, 1986 appears at 639 F.Supp. 46-56.

In order to reduce the racial isolation of KCMSD's black children, the court initially invited the State to seek the voluntary participation of surrounding districts in a transfer program by which KCMSD's minority students could volunteer to attend school in cooperating school districts nearby.[22] *Id.* at 38. In a survey ordered by the district court, thousands of black children expressed an interest in transferring out of the KCMSD to suburban schools. The court hoped that facilitating such transfers would "serve to provide additional opportunities for desegregated schools [within the KCMSD] as well as desegregative educational experiences for KCMSD students [in surrounding districts]." *Id.* Educating KCMSD's black students in the already existing and educationally appropriate classrooms of surrounding districts to which the State's violations previously had propelled the district's white students would have served to avoid the expense of renovating the KCMSD's "rotted" schools and of installing costly magnet facilities in the KCMSD to try to attract white students back from those surrounding districts.

For several years after the district court's initial remedy in 1985, Missouri did not act on the district court's order to develop a voluntary transfer plan. In 1986, the district court admonished the State for its inaction. 639 F.Supp. at 51 (warning the State that continued inaction will result in the court seeking "other methods of [desegregation] at the State's expense"). In 1990, after continued inaction by the State, the court of appeals ordered submission of a transfer plan. 904 F.2d at 419. The plan

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[22] Numerous school districts are nearby. In addition to the KCMSD, the City of Kansas City includes all or parts of 12 school districts. A dozen others are nearby.

submitted in 1990 resulted in only ten KCMSD black students transfering to a single suburban district.

Having decided against the mandatory busing of students to and from the suburbs, Order, January 25, 1985, and to and from the KCMSD's predominantly minority schools, 639 F.Supp. at 35, and faced with Missouri's failure even to try to induce voluntary transfer efforts, the district court considered other plans. It found that only two other devises were available to cure the State's intentional segregation of blacks within the KCMSD: magnet schools designed to desegregate KCMSD's schools voluntarily by attracting back some of the whites whom the violation had caused to leave the district, and capital improvements designed to repair the "generally depressing" physical condition in which the State and KCMSD's violation had left the district's facilities and thus to remove one cause of white abandonment of the district as a result of the violation.

The district court thereupon ordered the KCMSD to convert to magnet schools in order to "generate voluntary student transfers resulting in greater desegregation in the district schools" and "draw non-minority students from the private schools . . . and draw in additional non-minority students from the suburbs." Order, November 12, 1986, at 3, *aff'd*, 855 F.2d 1295 (8th Cir.), *cert. denied*, 490 U.S. 1034 (1989). The court of appeals affirmed the district court's findings that the violations had directly caused the segregation of blacks within the KCMSD and whites outside the district, and also affirmed the district court's determination that the "comprehensiveness of the

[magnet] plan was a step in the right direction" of undoing that unlawful segregation. 855 F.2d at 1304. In particular, the court of appeals determined that the magnet school orders were:

> bolstered by the district court's findings that the preponderance of black students in the district was due to the State and KCMSD's constitutional violations, which caused white flight. . . .
>
> These findings that the unconstitutional segregation caused the KCMSD to lose certain students form the basis for a remedy designed to attract them back.

Id. at 1302. The court of appeals found that the magnet school plan was "amply supported by the State's own evidence." The court of appeals further concluded that there was no evidence to support Missouri's contention that the magnet schools would not achieve voluntary desegregation of KCMSD schools. *Id.* This Court declined to review the magnet school judgments of the lower courts. 490 U.S. 1034 (1989).

In 1987 the district court next addressed the financial effects of the violation, namely, white voters' chronic refusal to vote funds for the district, and the consequent need for capital improvement. The court first requested the parties' assistance in suggesting ways that the chronically underfunded district could meet the financial requirements of the desegregation remedy. Order, July 16, 1987 at 16. Missouri replied, asking that the KCMSD, rather than the State, be required to pay the full 50 per cent share of the remedial expenses originally allocated to the district, and acquiescing in proposals for mandatory local tax increases, which the court thereupon ordered.[23]

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[23] 672 F.Supp. 400. The court of appeals affirmed, modifying the manner in which the taxes were to be increased. 855 F.2d

The district court next ordered a capital improvement plan to cure the financial and physical effects on the KCMSD of the State's violations and the consequent desertion of the district by white families and voters. The court found that unconstitutional segregation was in part responsible for the massive decay of school district buildings because the concentration of blacks and degradation of the district's educational programs made it impossible for the majority black district to secure the votes needed, from the still majority white voting population, to provide funds for repair and maintenance of its buildings. 672 F.Supp. at 403. In particular, the court found that the violations contributed to "numerous health and safety hazards, educational environment hazards," "inadequate lighting," "odors from unventilated restrooms with rotted, corroded toilet fixtures," "noisy classrooms" because of poor acoustical treatment, "faulty heating and electrical systems," and "inadequate fire safety systems." *Id.* Overall, the court found that buildings were in such disrepair as a result of the violation that even principals would not send their own children to them. Repairing those facilities was thus found to be "crucial" to the success of the voluntary desegregation plan.

The district court found that renovations of some and replacement of other buildings were necessary to (i) restore to victims of segregation the facilities denied to them by the violations, (ii) undo some of the educational harms caused by the violation, and (iii) upgrade facilities to a level that would not continue to discourage white enrollment. The district court further found that capital improvements were "crucial to the overall success of [the] desegregation plan." *Id.*

1295. This Court affirmed the tax increase as modified by the appeals court, 110 S.Ct. 1651 (1990).

The court of appeals affirmed findings that the defendants were to blame for the deteriorated facilities of the school district, that the improvements were necessary to achieve the desegregation of the district, and that the capital plan was not excessive to the requirements of the desegregation plan nor beyond the scope of the violations. *Id.* 855 F.2d at 1304-5.

E. Missouri's Specific Complaints

Central High School was the first high school that the State's and KCMSD's post-1954 violations caused to turn from an all-white to all-black school in the space of a few years. *See supra* note 14 and accompanying text. By the time the court had adjudicated the violation and was devising a remedy, Central was an all-black high school located in the center of an all-black residential corridor created by the State's housing violations and the district's school violations. Pet. App. at A42. *See supra* pp. 6-9. By then, the school was virtually falling down around its students. As the court found, restoring the integrated student population that Central would have had in 1954 had the district and the State required the integrated populations living near the school to attend it posed a "challenge" thirty years later. In the magnet school order not here at issue, the court directed that Central be renovated or replaced. Order, November 12, 1986. That plan provided for a dual theme magnet high school featuring a computer-based educational plan and a "Classical Greek" theme featuring a combination of rigorous academic and athletic programs. The district court noted that the "extensive" facilities and budget provided for in the plan were "necessary" to achieve "the difficult task of desegregating Central High School." Pet. App. at A49.

As the school district developed its design documents for Central, it discovered errors and incorrect

assumptions in the estimates underlying the court's original budget and sought the district court's approval for a revised budget. In approving the adjustments, the district court found that the school district had used proper budgeting procedures, had eliminated nonessential features of the plan, and had reduced costs wherever possible. Pet. App. at A49. It found a second time that the desegregative magnet program for Central "could not be successfully implemented in a lesser facility." *Id.*

On appeal, the court of appeals held that the conditions the district court identified as requiring a budget adjustment were properly found as a matter of fact. The appellate court accordingly concluded that the district court had properly modified the prior injunction "in the exercise of equitable discretion," and affirmed the modified Central High School plan. Pet. App. at A32-34.

The State did not seek a stay of the district court's order, and the KCMSD thereupon completed construction of Central High School. Nearly 1200 students are now enrolled in Central, including a significant and growing number of nonminorities.[24]

2. *Asbestos.* The capital improvements that the district court found were necessary to cure the educational, financial, and demographic effects of the violation required the KCMSD to renovate certain structures and to demolish others. Federal law[25] in turn required the KCMSD, in carrying out those renovation and demolition

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[24] Central, in this its first year in the new school, has 31.2% nonminority enrollment in the Classical Greek theme and 13.2% in the computers theme. Before the remedy was ordered Central was 99.7% minority. Ex.K2.

[25] Asbestos Hazard and Emergency Response Act, 15 U.S.C. §§2641-2654 (1988).

orders, to meet certain standards concerning the abatement of asbestos in public buildings undergoing construction and repair. Finding that the State's and KCMSD's constitutional violations were the reason why renovations were required and, thus, were the reason why federally mandated asbestos abatement had to occur, and finding that eliminating health hazards was an important component of a cure for the district's educational deficits and necessary to the success of the desegregation plan, Pet. App. at A56, the district court found that the expense of meeting the asbestos abatement requirements of federal law was a part of the overall desegregation expense. The court accordingly ordered the State and the KCMSD to share equally in the cost of abating asbestos that was likely to be dislodged in the course of completing the capital improvement plan.[26]

The court of appeals affirmed. Pet. App. at A24-26. It found that, in the "unique circumstances presented here," asbestos abatement during building work was necessary to assure "safe and healthy school facilities that are not an obstacle to education or to desegregation." Pet. App. at A-25.

The asbestos abatement tasks in the capital improvement work ordered by the district court are now virtually complete.

REASONS FOR DENYING THE WRIT

Unashamedly candid in its petition, the State of Missouri all but admits that the questions it here presents are

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[26] Similarly, the school district's capital program ordered by the court includes the cost of compliance with minimum and prevailing wage laws, OSHA's construction safety standards, and air quality standards. The State does not challenge those components of the plan.

not themselves worthy of this Court's plenary attention. Scrutiny of Missouri's petition yields not a hint of a conflict in the circuits nor even a suggestion of an important federal question presented by the budget-adjustment and asbestos-abatement matters that are all that is actually before the Court. Instead, Missouri freights two narrow, technical orders with the full weight of a remedy devised over almost a decade and grounded firmly in the nature and scope of the unique set of violations that necessitated the remedy. In the process, the State asks the Court to review (i) the district court's violation findings, which the State *never appealed*; (ii) the district court's 1984, 1985, 1986, and 1987 findings detailing the various educational, financial, physical, and racially segregative effects of the State's violations, which the State *never appealed*; (iii) the district court's 1985, 1986, and 1987 remedy orders, which the State either *never appealed* or as to which this Court previously has *denied certiorari*; and (iv) two more recent technical orders requiring certain remedial adjustments and details, as which the State never sought a stay and which accordingly are now, or soon to be, *entirely completed*.

The uninteresting, and now almost entirely academic, questions (whether, in the course of capital improvements, it was proper to make the school district adhere to federal asbestos-abatement safety standards and whether it was proper to correct estimation errors in the budget for a construction project previously affirmed on appeal) do not themselves merit this Court's review and cannot bear the weight of the many long-since-resolved issues that Missouri attempts to load upon them. Nor is there any reason to bootstrap a wider review of previously unappealed orders onto those two mundane questions.

A. THE LEGAL STANDARDS ON WHICH THE DISTRICT COURT RELIED IN SHAPING THE REMEDY ARE UNOBJECTABLE, MANDATE THE REMEDY ORDERED, AND WERE NEVER APPEALED BY THE STATE.

In its first remedy order in 1985 the district court adopted as its guiding principles the very constitutional limitations on remedies that the State claims were ignored.[27] The court insisted that "the scope of the remedy [be] determined by the nature and extent of the violation" and that the remedy eliminate "the vestiges of state imposed segregation." 639 F.Supp. at 23 (citing *Milliken v. Bradley*, 418 U.S. 717, 744 (1974)). Missouri has never challenged the appropriateness of these principles.

The court then proceeded to make findings of fact that linked violations to effects and linked effects to each component of the remedy the court ordered. Specifically, the court first found intentional segregation of blacks in the KCMSD and intentional degradation of the district's education program. The district court next found that these violations caused an "intense[]" concentration of blacks within the KCMSD, "inferior" educational opportunities, and a "system wide reduction in student achievement," 639 F.Supp. at 24, which in turn, caused "large numbers" of whites to flee from the KCMSD to suburban districts. Order of August 25, 1986. Next, the court found that in the absence of feasible and legally warranted mandatory-busing plans, and given the State's refusal to arrange for a transfer of blacks to the suburbs,

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[27] 639 F.Supp. at 23 (relying on *Milliken, Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979), *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406 (1976), *Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1 (1971), *Keyes v. School District No. 1*, 413 U.S. 189 (1973), *Green v. County School Board*, 391 U.S. 430 (1968), and *Watson v. Memphis*, 373 U.S. 526 (1963)).

only a magnet school plan could be a valuable and effective means of desegregating the district by attracting back a voluntarily integrated enrollment. Order of November 12, 1986. Finally, the court found that improving the buildings of the school district was "crucial to the overall success of the desegregation plan" and to overcoming the educational and physical effects of the violation. 672 F.Supp. at 403. None of those fact findings has ever been challenged by the State as erroneous.

In reviewing the remedy orders, the court of appeals relied on the same principles, 855 F.2d at 1299, approved the district court's fact findings, tested the remedies adopted against the limiting principles in *Milliken* and other cases, and affirmed the remedies.

To this date, Missouri has *never* claimed that the legal standards the courts below applied are incorrect, nor that the district's "violation" findings are incorrect, nor that the district court's effects (or "vestiges") findings are incorrect, nor that there should be no educational improvements to cure some of these effects, nor that magnet schools and voluntary transfers are impermissible means of curing other effects, nor that capital improvements are anything other than "crucial" to the success of the overall plan to cure the violations, nor that Central High School should not be replaced, nor even that asbestos should not be abated when necessary restorations take place.[28] Because the parties are in agreement on the applicable legal standards, because those standards

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[28] Indeed, before the district court entered the order now at issue, the State proposed its own asbestos abatement program, including its own request that the State be ordered to fund that abatement. State's Ex. 9 (August, 1987). Furthermore, as the court of appeals found, Missouri "did not appeal earlier orders of the district court and this court that included asbestos abatement costs." Pet.App. at A26.

premise an appropriate remedy on the district court's findings of violations, effects and necessary measures to cure those effects, and because the district court made, the court of appeals affirmed, and in most cases the State never appealed the requisite findings, there is no question of interest that is presented by this case.

B. The State's Defaults Since The Remedial Process Began, and Not Any Error by the Lower Courts, Are Responsible for the Remedial Expense.

The district court's findings of unconstitutional school segregation placed Missouri immediately under an "affirmative duty to take whatever steps might be necessary" to cure the segregative, educational and other effects of that violation. *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 459, (1979) (quoting *Green v. County School Bd.*, 391 U.S. 430, 437-38 (1968)). Explicitly invoking the State's constitutional obligation, the district court concluded its findings of violations by calling upon the State, on its own, to remedy the effects of its violation. 593 F.Supp. at 1505. Most specifically, the Court noted that the Missouri General Assembly "established the school districts and if it deems necessary, can change them" to achieve desegregation. Although the State's chief state school officer reached the same conclusion even before the district court rendered its decision,[29] Missouri ignored the court's invitation.

In 1985 the school district and the Jenkins class proposed a comprehensive remedy that would have consolidated area districts and achieved desegregation instantly and at very little cost to the State. Missouri opposed a mandatory interdistrict remedy, and the district court rejected it. Order, January 25, 1985. In 1985 the district

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[29] *See supra* note 11 and accompanying text.

court invited plans for magnet schools, 639 F.Supp. at 34, but again Missouri chose to submit no lan whatsoever, leaving the district court with no alternative but to work from the plan jointly submitted by the plaintift schoolchildren and the KCMSD.

Also in 1985, the court asked the State to use its good offices to establish a transfer plan for minorities to attend school in volunteering suburban school districts. 639 F.Supp. at 38. Among the beneficial features of such a plan to overcome the State's "intensive" concentration of blacks in the KCMSD would be its minimal cost, inasmuch as integrated sets of students could be educated in existing and educationally attractive facilities in the suburbs, in lieu of requiring the KCMSD to tear down old schools (abating asbestos in the process) and build new ones (among them Central High). Again, the State did not act. In 1986 the district court admonished the State to act, threatening to find "other methods of accomplishing this task at the State's expense." *Id.* at 51. Still, the State failed to establish a transfer program even though its success would have greatly reduced the expenses of the voluntary KCMSD plan about which it continues to complain.

Similarly, when the district court in 1987 sought suggestions for helping the KCMSD fund its share of the desegregation costs, the State offered no plan, expressed no opposition to the schoolchildren's motion for a court-ordered tax increase, and insisted that means be found to enable the school district to pay its own share. Yet, when the district court adopted the only proposal before it, in which the State previously had acquiesced, the State suddenly objected and brought the matter to this Court – still without alternative suggestions.

In summary, over and over again for nearly 40 years now, the State has adhered to a single unconstitutional and unhelpful pattern of action in this case: defaulting in

its primary duty to cure the effects of its violation; defaulting in its fall-back duty to propose remedies for the court's consideration; withholding objection from, and even supporting, aspects of the remedy that the Court is considering; and then complaining after-the-fact about the expense of remedies that it never previously opposed and that were necessitated by the extent and continuation of its violations and by its rejection of less costly remedial options.

Now, Missouri again attacks a remedy for which it has proposed no alternative of its own, as to which it has resisted every alternative remedy proposed by others, and about which it has limited its contribution to after-the-fact complaints about expense. The violations found against Missouri, and never appealed, caused "a large number of whites" to flee the school district to the suburbs, degraded the educational opportunities for the minority students left behind, and literally "rotted" the district's instructional plan. Missouri accordingly placed itself under a continuing obligation to the schoolchildren, and to the courts, to eliminate those effects, an obligation satisfied only by effective actions to decrease the effects of its segregation. *Columbus*, 443 U.S. at 459. Yet, in this Court, as consistently below, Missouri fails to identify how the schoolchildren will be relieved of harms that no party denies the State caused and that no party doubts still exist.

Moreover, the State itself is responsible for the single aspect of the remedy about which it complains, namely, cost. According to the district court's findings, the State intentionally segregated blacks within the KCMSD for 120 years prior to September 1984, causing the system-wide racial segregation of the district, generating pervasive education decline, and resulting in massive physical decay. The cost of curing these illegally caused conditions

is undoubtedly expensive. But how could a cure for 120 years of determined and racially, educationally, and physically costly violations be *other* than expensive?

Accordingly, whether because of its ongoing constitutional default, its unclean hands, or its having repeatedly sandbagged the district court, the State has no valid complaint about a remedy that its unlawful pre- and post-*Brown* actions required or a remedial expense that its post-1984 inaction has singlehandedly inflated.

C. The Remedy is Manifestly Within the Court's Discretion Given its Avoidance of Remedial Burdens on Parties Other Than Those Directly Responsible for the Violation and its Effectiveness.

Initially, the Jenkins class of schoolchildren favored and sought an interdistrict remedy but the district court denied consolidation relief, concluding that the remedy would excessively intrude the court in the affairs of the suburban school districts. The court then noted that the Missouri General Assembly had created those districts and could easily and integratively reorganize them if it chose. "If such legislation is the only means by which the State can fulfill its fourteenth amendment obligations," the court wrote, "then such legislation is mandatory." 593 F.Supp. at 1504. The General Assembly chose not to act, however, and the court chose not to make it act – again given the extent to which such an order, although supportive of the least expensive and most effective remedial option, might intrude on the interests of innocent suburban jurisdictions and citizens.

The district court next asked the State to use its good offices to secure voluntary participation by the suburbs in a voluntary interdistrict desegregation remedy. 639 F.Supp. at 38. While more expensive than a remedy that simply redrew boundary lines, such a plan still would

have been less expensive than having to build magnet schools and refurbish facilities in the KCMSD. Nonetheless, despite repeated orders by the district court, the State refused to act. Absent action by the State, and barring pressure by the court on innocent suburban districts, parents, and children, the remedial constraint on involving innocent parties trumped the remedial requirement of effective removal of segregative vestiges, and no interdistrict transfer was implemented.

In early 1985, the State proposed a mandatory *intra*-district remedy to move the plaintiff schoolchildren from one inferior facility with substandard educational services and a majority black student body to another. *Id.* at 35. The district court rejected this approach as well – on grounds that the State's proposal not only burdened innocent victims of the violations but also would have been entirely ineffective in removing the segregative and educational effects of the State's violation.

Having rejected all these remedies as excessively intrusive on the interests of innocent individuals and suburban school districts and having rejected the State's single proposal on the additional ground of remedial ineffectiveness, the district court instead ordered a less intrusive remedy: academic programs and ancillary relief to remedy the segregation-caused inferior education available to students in the mostly minority KCMSD as approved in *Milliken v. Bradley II*, 433 U.S. 267 (1977); voluntary transfers of nonminorities to magnet schools as also approved in *id.*; and refurbished buildings in the KCMSD to reverse some of the physical, educational and segregative effects of the State's violations.

It is true that the remedy imposed was more expensive than the other proposals. It also is true, as plaintiffs have repeatedly made clear to the district court, that this remedy is (and remains) less satisfactory to them –

because it is less immediately effective – than either a mandatory interdistrict consolidation plan or a mandatory interdistrict transfer plan or even a meaningful *voluntary* interdistrict transfer plan. But the plan the court chose has another virtue, which is legally decisive under the this Court's remedial-effectiveness decision in *Green*, 391 U.S. at 437-39, and its remedial-limits decision in *Milliken*, 433 U.S. at 280, as interpreted by the district court: among all the available plans, the one the court imposed is the only one that holds out even a hope of removing the vestiges of the State's violations and, at the same time, does not mandatorily involve school districts and schoolchildren who were not responsible for those violations.

The district court can hardly be said to have abused its discretion in selecting the only educationally and desegregatively effective option that is available.

D. The Remedy Is Working

Having eschewed the broader, mandatory, and more intrusive plans first presented to it, and having declined Missouri's requests that the violations be left essentially without a remedy, the district court adopted a middle course and ordered a voluntary plan. As the court of appeals noted, although the "KCMSD has only begun its vast efforts to remedy the vestiges of the dual system of education in the school district," 942 F.2d at 491, the district court's plan already is bearing fruit. This year 913 new nonminority students from the suburbs have been attracted to the KCMSD's magnet schools – Central High School among them – joining 778 nonminority students who have re-enrolled from previous years. These 1,691 students have caused for the first time in two decades a

significant increase in the percentage of nonminority students in the KCMSD. September, 1991 Census of Students.

The educational programs and improved facilities targeted for the mostly minority students in the KCMSD also show early signs of working. Science and math scores in many schools have especially shown dramatic improvement, reversing trends suffered in most urban schools.[30]

E. The Asbestos Abatement And Budget Adjustments to Which the State Objects Are Necessary, Proper, and Entirely Non-Controversial Components of the Remedial Effort

If, as Missouri never disputes, magnet schools are appropriate remedies for its violations, and if, as Missouri never disputes, buildings must be renovated to house those schools, and if as federal law requires and both courts found below, asbestos necessarily must be abated from buildings being renovated, then what possible objection can there be to include abatement in the remedial budget? Unable to challenge the fact findings that some construction is required as a part of the magnet remedy, that abatement is then required, and that the costs of abatement are thus necessarily costs of the magnet remedy, the State is reduced to attacking the overall price tag on a set of remedies that are not before the Court, in which the State has largely acquiesced, and as to which the State has no legally or equitably sound objection.

Similarly as to the Central High costs estimates, if construction of a new school is required by the magnet school remedy, the district court may estimate construction costs and change them upon appropriate fact findings to correct errors. No more than that was done by the lower courts, and

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[30] "Since 1987, KCMSD scores have improved on every subtest at every grade level" except two. Missouri Mastery and Achievement Tests, Spring, 1991 Performance at 2.

none of it is here challenged by Missouri for being based on erroneous findings. Thus, as to Central also, the State finds it must attack the remedy itself.

The original 1985 remedy order, 639 F.Supp. 19, provided for both magnet schools and capital improvements. The State did not appeal the magnet school order and the provision for capital improvements was affirmed, 807 F.2d at 685, and Missouri did not seek certiorari. Missouri thus seeks relief from principles established in orders entered nearly seven years ago, principles it does not challenge, and from fact findings implementing those principles, fact findings it does not challenge as erroneous. There is thus no basis for accepting Missouri's invitation to use two narrow orders as the means for a broad and wholesale review of a remedy properly adopted years ago and appropriately implemented ever since.

CONCLUSION

For the foregoing reasons, the writs should be denied.

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No. 91-324

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

STATE OF MISSOURI, *et al.*,
Petitioners,
v.
KALIMA JENKINS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION OF RESPONDENT KANSAS CITY, MISSOURI SCHOOL DISTRICT

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the courts below acted well within their equitable discretion to modify a desegregation plan, the scope of which this Court has declined to review, by assuring that as part of capital improvements necessary to make schools sufficiently safe, healthy and suitable for desegregation programs asbestos hazards would be abated to the extent required by federal law.

2. Whether the courts below similarly acted well within their equitable discretion to modify the desegregation plan by adjusting the budget required for the construction of a single high school, where the record at an evidentiary hearing demonstrated that errors in the original budget estimate, and new information about the actual costs of construction, necessitated a revised budget.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF IN OPPOSITION OF RESPONDENT KANSAS CITY, MISSOURI SCHOOL DISTRICT [1]

COUNTERSTATEMENT OF THE CASE

A. Liability and Initial Remedy Proceedings.

After a 92-day trial on interdistrict and intradistrict desegregation claims brought by the Jenkins plaintiff class of schoolchildren and the Kansas City, Missouri School District ("KCMSD"),[2] on September 17, 1984 the district court (The Honorable Russell G. Clark) found that "[t]he people of the State of Missouri through con-

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[1] The Kansas City, Missouri School District respondents include the school district itself and its Superintendent.

[2] The KCMSD originally filed the complaint in 1977 against State of Missouri defendants and a group of surrounding school districts. The KCMSD was re-aligned as a defendant and separate counsel was retained to represent the plaintiff schoolchildren. Trial proceeded both on the claims of the Jenkins plaintiff class and KCMSD's cross-claims against the State. The district court granted the motions to dismiss of the surrounding school districts on June 5, 1984.

stitutional provision and the General Assembly through legislative enactments mandated that all schools for blacks and whites in th[e] State were to be separate" in violation of the Fourteenth Amendment, and that "the inferior education indigenous of the state-compelled dual school system has lingering effects in the Kansas City, Missouri School District." *Jenkins v. Missouri*, 593 F. Supp. 1485, 1503-04, 1492 (W.D. Mo. 1984). With these liability findings, uncontested by the State, the parties and district court began the development of the remedy for this violation.

The State and the KCMSD submitted proposed desegregation plans, and Judge Clark held two weeks of hearings that resulted in his initial remedial order of June 14, 1985. The plan adopted by the district court had four key components designed both to achieve actual desegregation and to restore the black schoolchildren who were the victims of segregation to the position they would have occupied in the absence of discriminatory conduct. First, Judge Clark approved educational programs "designed to increase student achievement" because segregation had "caused a systemwide *reduction* in student achievement in the schools of the KCMSD." *Jenkins v. Missouri*, 639 F. Supp. 19, 25, 24 (W.D. Mo. 1985) (emphasis in original), *aff'd*, 807 F.2d 657 (8th Cir. 1986) (*en banc*), *cert. denied*, 484 U.S. 816 (1987). KCMSD, the plaintiff schoolchildren, and the State all had supported inclusion of educational components in the remedy. *Jenkins*, 639 F. Supp. at 24.

The second remedial component approved by the court was the use of magnet schools to draw new non-minority enrollment to the KCMSD, to encourage voluntary desegregative transfers within the school district, and to make better educational opportunities available to minority as well as non-minority students in the district. *Id.* at 34. Judge Clark specifically found that magnet schools which would draw a voluntarily desegregated enrollment based on a special theme or method of teach-

ing held better promise of achieving actual desegregation than the State's preferred method of mandatory student reassignment and busing, which would "only serve to increase the instability of the KCMSD and reduce the potential for desegregation." *Id.* at 38. As a third component of the remedy, Judge Clark ordered the State to seek the active cooperation of surrounding school districts in a voluntary interdistrict transfer program. *Id.* at 38-39. The voluntary enrollment of non-minority students from area districts in KCMSD magnet schools, and the opening of opportunities for minority students from KCMSD to attend integrated suburban schools, was found by the district court to be an appropriate remedial component because of the difficulty of desegregating the KCMSD, which had become nearly 70 percent black and had an enrollment of 90 percent or more black in 25 of its 66 schools. *Id.* at 39, 36. That component of the remedy, and the remedial goal of attracting non-minority students from outside the KCMSD back to its magnet schools on a voluntary basis, also was responsive to the district court's findings that "segregated schools, a constitutional violation, ha[ve] led to white flight from the KCMSD to suburban districts, large number[s] of students leaving the schools of Kansas City and attending private schools and that . . . has caused a system wide reduction in student achievement in the schools of KCMSD." Aug. 25, 1986 Order at 1-2.[3]

The court also approved as a fourth component of the remedy a program of capital improvements, because "[t]he current condition of the . . . school facilities

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[3] The State's Petition contends that "the plaintiffs . . . proved neither an interdistrict violation nor an interdistrict effect." Pet. at 4. The respects in which the remedy provides for voluntary interdistrict desegregation are fully supported by Judge Clark's orders, including the August 25, 1986 Order quoted in text, and by the extensive evidence presented in the liability case that the violation had significant interdistrict aspects. That evidence is described in the Brief in Opposition of Respondents Kalima Jenkins, *et al.*, at the Counter-Statement of the Case.

adversely affects the learning environment and serves to discourage parents who might otherwise enroll their children in the KCMSD . . . ." 639 F. Supp. at 39. Judge Clark recounted the evidence of "safety and health hazards, educational environment impairments, functional impairments, and appearance impairments" in the schools, *id.*, and concluded that "improvement of school facilities is an important factor in the overall success of this desegregation plan." *Id.* at 40.

On cross appeals to the United States Court of Appeals for the Eighth Circuit, KCMSD and the Jenkins plaintiffs argued that the district court erred in the legal standard that it applied to dismiss the surrounding suburban school districts, while the State questioned "what the vestiges of th[e] dual school system are 30 years after it was declared void and what constitutes a proper remedy to eliminate those vestiges." Brief of State Appellees/Cross Appellants at 40 (No. 85-1765WM, *et al.*) (filed Sept. 23, 1985). The State also attacked some components of the remedy, particularly components for which the district court set funding allocations that required most of the cost to be paid by the State.[4] With regard to the voluntary interdistrict transfer plan, the State argued "that an order requiring support of an exchange program between numerous school districts, based solely upon a violation in one of those districts, imposes an interdistrict remedy for an intradistrict violation." *Id.* at 54.

The Eighth Circuit affirmed the dismissal of the surrounding school districts and made modest alterations in the allocation of funding for the remedy, but affirmed

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[4] As the Eighth Circuit observed, "[n]o one challenge[d] the substantial portion [of the remedy] in which the costs are divided evenly between the State and the KCMSD." *Jenkins v. Missouri*, 807 F.2d 657, 682 (8th Cir. 1986) (*en banc*), *cert. denied*, 484 U.S. 816 (1987). Those portions of the remedy included most of the components designed to improve educational achievement and the holding that magnet schools would be the basis in the remedy for student reassignment.

the inclusion of a voluntary interdistrict transfer component and capital facilities improvements in the remedy. The Eighth Circuit specifically held that an interdistrict transfer plan, on a voluntary basis, is an appropriate part of a remedy where liability against the State has been established because such transfers would assist in the achievement of desegregation *within* the KCMSD. *Jenkins*, 807 F.2d at 683-84. The court reiterated, however, that a mandatory interdistrict remedy (such as consolidation of school districts or mandatory assignment of students across school district lines) would be outside the scope of the violation found by the district court and thus beyond the district court's power. *Id.* at 683 n.30. With respect to capital facilities, the Eighth Circuit further held that the district court's findings of hazards in the schools that impede attraction of students and obstruct the success of the educational programs included in the remedy were "sufficient to support its conclusion that capital improvements are necessary for successful desegregation." *Id.* at 685. The court went on, however, to reallocate funding responsibility for capital improvements on an equal basis between the State and the KCMSD, rather than requiring the State to pay most of the cost. *Id.*

The KCMSD and Jenkins plaintiffs petitioned this Court for a writ of certiorari to review the legal basis of the Eighth Circuit's affirmance of the dismissal of the surrounding school districts. This Court denied certiorari. 484 U.S. 816 (1987). No cross-petition was filed by the State on the scope of remedy issues it raised in the Eighth Circuit. The order setting the initial scope of the remedy, with the modest modifications made by the Eighth Circuit, thus became the law of the case. *See Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 816 (1988). Because no party had sought a stay of implementation during the pendency of the proceedings, the implementation of the remedy began at the start of the 1985-86 school year.

Over the six years since the implementation of the remedy began, the district court has entered numerous orders clarifying, renewing, or setting specific parameters on the remedial components. Of greatest note, on June 16, 1986, the district court approved for fall of 1986-87 the opening of an initial group of six magnet schools, and on November 12, 1986, ordered a Long-Range Magnet School Plan that was to be phased in over a six-year period. Each of these orders also provided for capital facility improvements to accommodate the special needs of the magnet school programs and to bring the schools up to an acceptable level of safety, health and appropriateness for educational programs. *Jenkins v. Missouri*, 639 F. Supp. 19, 53-55 (W.D. Mo. 1986), *aff'd*, 855 F.2d 1295 (8th Cir. 1988), *cert. denied in relevant part*, 490 U.S. 1034 (1989); *Jenkins v. Missouri* No. 77-0420-CV-W-4, slip op. at 4 (W.D. Mo. Nov. 12, 1986).

On September 15, 1987, the district court approved a Long-Range Capital Improvements Plan to implement a significant part of the remaining capital needs to make KCMSD schools sufficiently safe, healthy, comfortable and attractive for both the magnet school programs and for the desegregation educational programs. The court specifically found that KCMSD's "physical facilities have literally rotted" and that the "overall condition" of the schools remained "generally depressing and thus adversely affects the learning environment and continues to discourage parents who might otherwise enroll their children in the KCMSD." *Jenkins v. Missouri*, 672 F. Supp. 400, 411, 403 (W.D. Mo. 1987), *aff'd*, 855 F.2d 1295 (8th Cir. 1988), *cert. denied in relevant part*, 490 U.S. 1034 (1989). The district court premised this order on two findings. First, the court found that the State's mandatory segregation had caused these "rott[ing]" physical conditions, since large numbers of white taxpayers with children, who previously had contributed to the majorities needed to pass levy increases and bond elections, left the district, thereby "prevent[ing] the KCMSD from raising funds to maintain its schools." 672 F. Supp. at

411, 403, citing November 12, 1986 Order at 4. Second, the court found that "a long-range capital improvement plan aimed at eliminating the substandard conditions present in KCMSD schools is properly a desegregation expense and is *crucial* to the overall success of the desegregation plan." *Id.* at 403 (emphasis added).

The State appealed these three orders to the Eighth Circuit, once again arguing strenuously that the orders exceeded the district court's equitable discretion because the State believed they went beyond the bounds of the violation that the district court found. Once again, the Eighth Circuit affirmed. *Jenkins v. Missouri*, 855 F.2d 1295, 1299-1300 (8th Cir. 1988), *cert. denied in relevant part*, 490 U.S. 1034 (1989). The Eighth Circuit based its affirmance on the principle that "the victims of unconstitutional segregation must be made whole, and . . . to make them whole it will be necessary to improve their educational opportunities and reduce their racial isolation." *Id.* at 1301. The court further affirmed the capital improvements plan, based on the district court's "findings" that the constitutional violations of "both KCMSD and the State had caused the decay of the KCMSD's buildings." *Id.* at 1300. The court recognized that "[t]he foundation of the plans adopted was the idea that improving the KCMSD as a system would at the same time compensate the blacks for the education they had been denied and attract whites from within and without the KCMSD to formerly black schools." *Id.* at 1301. The court went on to affirm as modified a procedure by which local property taxes could be raised to pay the KCMSD's share of the remedy that both it and the district court had found to be constitutionally required. *Id.* at 1308-15.

The State petitioned this Court for a writ of certiorari to review two questions presented by the Eighth Circuit's affirmance:

1. Whether a federal court, remedying an intradistrict violation under *Brown v. Board of Education*, 347 U.S. 483 (1954), may

a) impose a duty to attract additional non-minority students to a school district, and

b) require improvements to make the district schools comparable to those in surrounding districts.

2. Whether a federal court has the power under Article III, consistent with the Tenth Amendment and principles of comity, to impose a tax increase on citizens of a local school district.

See 57 U.S.L.W. 3577 (Feb. 28, 1989) (No. 88-1150).

This Court granted the petition to review the second question only. 490 U.S. 1034 (1989). The decision on the merits, issued on April 18, 1990, addressed only the issue of whether the tax orders of the district court and the court of appeals exceeded their equitable and constitutional power. *Missouri v. Jenkins*, 495 U.S. 33, ——, 110 S. Ct. 1651, 1660 (1990) ("[w]e granted the State's petition, limited to the question of the property tax increase . . . ."). The magnet school and capital improvement orders thus have been in the process of implementation since the district court's orders were issued in 1986 and 1987.

B. The Orders at Issue.

The two particular orders at issue in the State's petition for certiorari are among a series of orders by the district court that have made modifications in the desegregation plan in the course of implementation, based on experience and further information that has become available.

1. *The Asbestos Order.*

The Long-Range Capital Improvements Plan and the earlier capital improvements ordered for the initial stages of the magnet school plan all contemplated that some asbestos abatement would be done as part of the renovation work at District schools. The district court originally so ordered because it held that "a school facility which

presents safety and health hazards to its students and faculty serves both as an obstacle to education as well as to maintaining and attracting non-minority enrollment." 639 F. Supp. at 40. In fact, the State's own proposed capital improvement plan, which the district court rejected because it was inadequate in other respects, acknowledged that asbestos abatement necessarily would have to be part of the desegregation-related work and provided budget estimates for that work.[5]

The cost of asbestos abatement was particularly difficult to specify with certainty in advance of each project. This is true because it generally cannot be known until a renovation project begins precisely where asbestos will be found and what means will be necessary to abate it. The record also shows that other desegregation-related capital improvement plan work, such as knocking out walls to enlarge learning spaces and opening walls to gain access to decrepit pipes and electrical wiring, has created a need for asbestos abatement that otherwise would not exist.[6]

Moreover, on October 30, 1987, the United States Environmental Protection Agency published final rules pursuant to the Asbestos Hazard Emergency Response Act of 1986 ("AHERA"), 15 U.S.C. §§ 2641-2654 (1988), establishing strict standards for maintaining environments free of asbestos hazards. The rules went into effect on December 14, 1987. 52 Fed. Reg. 41826 (Oct. 30, 1987). Thus the actual work done by KCMSD under the capital improvements plan had to comply with the new, stricter standards; the inspections originally conducted by the KCMSD for the presence of asbestos in its facilities and the less expensive methods KCMSD originally contem-

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[5] *See* State's Ex. 9, Tr. Vol. VI at 64 (Aug. 11, 1987).

[6] *See* Declaration of Don M. Powers, in support of KCMSD Motion for Increased Funding for CIP Asbestos Abatement Costs (filed Dec. 7, 1988), ¶ 3.

plated for handling asbestos abatement were no longer consistent with federal law.[7]

By late in 1988, the KCMSD had completed asbestos abatement work and knew the necessary costs for the first six magnet schools that had opened in the KCMSD. The KCMSD moved the district court for approval of the asbestos abatement costs in excess of its original estimates for those six schools—some $910,224—as a desegregation cost required to meet federal health and safety standards in regard to the work that remedying the constitutional violations required in the KCMSD's school buildings. It also sought court approval of the use of AHERA standards as an appropriate guideline for the KCMSD's future renovation of school buildings to make them available and suitable for desegregation programs.[8]

The State opposed the District's motion, contending that asbestos abatement is not a desegregation expense, but it produced no evidence challenging the facts that the renovations otherwise necessitated by the constitutional remedy in turn necessitated asbestos abatement for the health and safety of children in KCMSD schools.[9] The record showed, to the contrary, that the renovations required to remedy the violation would dislodge asbestos-containing materials, and once they did, AHERA would require a level of abatement as a matter of federal law that was more stringent than originally contemplated by the KCMSD when it prepared its estimated budgets for capital improvements. Although one of the State's major

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[7] *See* Declaration of Walter Houston, in support of KCMSD Motion for Increased Funding for CIP Asbestos Abatement Costs (filed Dec. 7, 1988), ¶ 3.

[8] The State's Petition at page 11 confuses the schools and amounts involved in the KCMSD's motion. The $910,224 increase was for the six schools in "Phase III" of the capital improvements plan; the Phase III increase requested was not in addition to the $910,224.

[9] *See* State's Response to KCMSD Motion for Increased Funding for CIP Asbestos Abatement Costs (filed Jan. 5, 1989).

arguments was that school districts generally have to comply with AHERA so the costs of compliance should not be a desegregation expense, it produced no evidence to counter the KCMSD's proof that the cost in the KCMSD was extraordinary *because* the asbestos-containing materials would not have been dislodged had the constitutional violations not required desegregation-related capital improvements work that the court ordered.[10]

The district court granted the KCMSD's motion, with some modifications in the requested allocation of costs between KCMSD and the State. The district court noted that the Eighth Circuit, in its affirmance of the scope of the capital improvements plan, already had anticipated that " 'the capital plan that we affirm today does not cover all expenditures that may be necessary between now and the 1991-92 school year [including some] asbestos removal costs.' " Pet. App. A-56, *quoting Jenkins*, 855 F.2d at 1306.[11]

On the State's appeal to the Eighth Circuit, that Court affirmed, citing the uncontested evidence that achieving an acceptable level of health and safety was an appropriate goal for capital improvements in a desegregation plan, that asbestos abatement was vital to health and safety, and that "the evidence in the record . . . differentiates this situation from situations found at other school districts, or for that matter any other public buildings" because "many asbestos-containing products that normally would pose no danger (such as flooring), become potentially dangerous when disturbed during the [court-ordered] renovation work" needed to remedy the constitutional violations. Pet. App. A-25.

The State sought no stay of the district court order pending appeal. The asbestos abatement work approved

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[10] *Id.*

[11] We cite the State's petition for writ of certiorari as "Pet."; the State's Appendix in support of its petition as "Pet. App."; and the Joint Appendix from the Eighth Circuit *Jenkins III* Appeal, No. 89-1838WM, reported at 855 F.2d 1295 (8th Cir. 1988) as "J.A."

for the six magnet schools has been done, and the $910,-224 budget increase for that work has been expended. In fact, the vast majority of asbestos abatement called for under the capital improvements plan is complete.

2. *The Central High School Order.*

When the Long-Range Magnet School Plan was proposed in 1986, Central High School was a virtually all-black school, located in the "central corridor" area of Kansas City which is heavily minority. J.A. 2477-78, 988-89. It was at that time in the worst physical condition of any KCMSD high school. J.A. 2388. Testimony during the Long-Range Magnet School Plan hearing demonstrated that water damage, falling plaster and ceiling tiles, worn out floors and peeling paint were prevalent throughout the school. Testimony of Dr. Richard Hunter, Volume II at 396-400 (Sept. 16, 1986). Dr. Hunter stated that one could "see daylight" through a hole in the auditorium's roof and "when it rains it just came directly into the auditorium. Very depressing conditions walking around the building and a very poor educational facility." *Id.* at 399-400.

Among the initial capital facility projects approved for magnet schools as part of the Long-Range Magnet School Plan order was the construction of a new Central High School. No party contested that a new building was necessary for reasons of safety, health, comfort and attractiveness for educational programs, and for the special facilities needed to implement at Central both the Computers Unlimited and Classical Greek magnet themes.[12] The approval of a new Central High School building thus became final with the Eighth Circuit's affirmance of the

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[12] The Computers Unlimited program offers computer-assisted instruction and specialized courses involving computer technology, while the Classical Greek program emphasizes development of "a sound mind and a sound body" by combining a vigorous liberal arts and classical studies curriculum with unique opportunities for athletic training and physical education, including a focus on Olympic events and activities. J.A. 596-98, 599-601.

November 12, 1986 Order, and this Court's denial of the State's petition for certiorari to review that affirmance.

As KCMSD developed the design for the new Central High School, it became clear that the budget approved by the courts below would not be adequate for the program requirements for the new facility. The budgets originally presented to the district court by the KCMSD were "based upon studied estimates" that the district court held could be "adjusted when the actual costs of the capital facilities work and the magnet school plan ordered by the Court are ascertained." November 12, 1986 Order at 6.

In September 1988, the KCMSD filed a motion asking the district court to increase the construction budget for Central to recognize the "actual costs" necessary for the construction. After extensive discovery, the district court held a three-day hearing. The court heard expert testimony by architects for both the KCMSD and the State, the KCMSD's construction project manager, and educators, parents and community members involved in the development of the programs at Central, or who contemplated sending their children to school there.

The district court approved the budget modification for the construction of the new Central High School, excluding the costs associated with a high diving tower.[13] Pet. App. A-46, A-50. The court carefully reviewed the basic reasons why the original budget was inadequate: 1) a flawed design assumption that certain enclosed athletic facilities could be located inside an indoor track; 2) an incorrect assumption about the appropriate design "efficiency ratio," or ratio of net program space to gross building space; and 3) the erroneous omission of archi-

[13] In the same order the district court approved a site for Central and a revision in the alignment of budget years and adjustment in the cost of equipment for the school. Pet. App. A-50–A-52. The State did not present evidence disputing those aspects of the Central project.

tects' and engineers' fees, soil survey and testing and bid advertising from the estimate. All of these issues were the subject of discovery and hearing testimony by expert architects and a construction manager. The court also carefully reviewed the extensive evidence that the facilities proposed by the KCMSD for Central, particularly the athletic facilities on which the court made findings on a room-by-room basis, were necessary for the magnet school theme. Pet. App. A-45-A-49. The State's own witness admitted, as the district court noted, that various facilities were appropriate to the program and would be attractive to a desegregated enrollment. Pet. App. A-46, A-47. The court specifically found that "[t]he magnet programs could not be successfully implemented in a lesser facility," and that "such facilities are necessary to attract non-minority suburban students to the inner city to accomplish the difficult task of desegregating Central High School." Pet. App. A-49. The court also reviewed the uncontested evidence that the KCMSD made efforts to remain within the original budgets, and that in the course of so doing eliminated certain art, athletic and music facilities from Central that also could be attractive but that were not essential to the program. Pet. App. A-49-A-50.

On an appeal taken by the State, the Eighth Circuit affirmed. That court rejected the State's argument that the district court exceeded its authority in modifying its earlier budget order for Central, because "a federal court has 'inherent jurisdiction in the exercise of its equitable discretion and subject to appropriate appellate review to vacate or modify its injunctions.'" Pet. App. A-32, *quoting Booker v. Special School Dist. No. 1*, 585 F.2d 347, 352 (8th Cir. 1978), *cert. denied*, 443 U.S. 915 (1979). The court recognized that the original order approved "studied estimates to be adjusted as actual costs were ascertained," and the district court's order demonstrated its careful consideration of the various facilities proposed within the school. Pet. App. A-33. In particular, the court pointed out that the State made no argument

that any of the district court's findings were "clearly erroneous." Pet. App. A-34; *see* Fed. R. Civ. P. 52(a). Applying this Court's standard in *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985), the court was "convinced that the district court did not clearly err in finding that the KCMSD's design process was appropriate, that the additions to the planned athletic facilities were justified, that the allocated space of 200 square feet per student is necessary to implement the magnet themes and enhance the school's attractiveness to non-minority students, and that the increased construction and equipment budgets are necessary to meet the design requirements." Pet. App. A-34.

Once again, no stay was sought or issued pending appeal. In fact, the new Central High School building was constructed and open to students on September 3, 1991. Nearly 200 non-minority students are now in the Central High School student body, resulting in a 17.5 percent non-minority racial composition. This is a significant change from the all-minority student body that Central had before it became a magnet school.

REASONS FOR DENYING THE WRIT

The decision which the State seeks to have this Court review presents highly fact-bound, narrow, and technical issues of the correct budget amounts for certain construction activities as part of a desegregation plan. It is extraordinary to contemplate the prospect of this Court delving into the intricacies of building efficiency ratios, the extent of appropriate asbestos abatement during school renovations and the like. No conflict among the circuits or important question of federal law is presented by why it costs more than originally anticipated in 1986 or 1987 to build a new Central High School in 1990 and 1991, or why it costs more to abate asbestos during school renovations after new federal regulations raised health and safety standards for that work. Under the "two-court rule," the extensive fact findings that supported the revised estimates should not be disturbed by this Court.

In any event, the issues the State asks the Court to review are moot, because Central High School is finished, and received its new student body on September 3, 1991. The asbestos work that was the subject of the $910,224 budget increase the State complains of has been performed. No decision of this Court could alter the scope of what has been done in these projects.

In apparent recognition that the orders actually at issue do not present questions worthy of the Court's review, the State invites the Court to take "a renewed opportunity to consider the scope of the ongoing school desegregation remedies ordered by the United States District Court for the Western District of Missouri for" the KCMSD. Pet. at 2. Such an invitation is inappropriate, because the Court already declined to review the magnet school and capital improvement plans affirmed in *Jenkins v. Missouri*, 855 F.2d 1295 (8th Cir. 1988), *cert. denied in relevant part*, 490 U.S. 1034 (1989), and the State never even sought this Court's review of the basic structure of the remedy approved in *Jenkins v. Missouri*, 807 F.2d 657 (8th Cir. 1986) (*en banc*), *cert. denied*, 484 U.S. 816 (1987). The remedy has been in implementation for years. All of the conversions to magnet schools called for in the initial six-year cycle of the plan have taken place; most of the capital improvements have occurred. It would be tremendously disruptive of a remedy that is off to a successful start for this Court to attempt now, in the context of far narrower issues, to review the reams of testimony, exhibits, other record evidence and fact findings that support the desegregation remedy in Kansas City.

I. REVIEW OF THE COST OF CENTRAL HIGH SCHOOL AND ASBESTOS ABATEMENT WOULD BE INAPPROPRIATE UNDER THIS COURT'S STANDARDS FOR GRANTING A PETITION FOR CERTIORARI

The actual issue before the courts below that culminated in the approval of a revised budget for Central High School and for asbestos abatement was limited to

ascertaining the appropriate and accurate cost of those projects. The court previously had found that a new Central High School to replace the segregation-scarred Central High School building was a necessary part of the desegregation plan. Indeed, the State in those earlier proceedings had offered no evidence contesting the need for a new Central High School as part of the desegregation plan, nor did it challenge that asbestos abatement had to be done in KCMSD school buildings to make them sufficiently safe and healthy for successful desegregation programs. Indeed, the State's own proposed desegregation plan component for capital improvements called for asbestos abatement as part of the renovation work.[14]

It is simply not the case that these increased budgets were ordered, as the State suggests, because it would be nice to have bigger, better, or fancier schools to attract non-minority enrollment. In the case of Central High School the actual stated reasons for the budget increase, in both the KCMSD's request and the district court's findings, are: 1) The budget needed to include items that originally were omitted erroneously such as architects' and engineers' fees, bid advertising, soils survey and testing, furniture and construction contingencies; 2) A 72 percent ratio of net to gross building space was more appropriate than the 85 percent ratio assumed in the original estimate; and 3) Certain athletic facilities could not properly be located inside an indoor running track. Pet. App. A-43, A-50. The asbestos budget increase was requested by the KCMSD, and affirmed by the Eighth Circuit, based on "uncontested evidence . . . that asbestos was found in existing buildings during the court-ordered renovation, and that many asbestos-containing products that normally would pose no danger (such as flooring), became potentially dangerous when disturbed during the renovation work,"—factors which "differentiate[ ] this situation from situations found at other school districts,

[14] *See* note 5, *supra*.

or for that matter any other public buildings." Pet. App. A-25.

Because these findings of fact were reviewed by two lower courts, this Court should follow its "traditional deference to the 'two-court rule,'" *United States v. Ceccolini*, 435 U.S. 268, 273 (1978) (citation omitted), and decline review. As this Court has frequently stated "[a] court of law, such as this Court is, rather than a court for correction of errors in factfinding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987), *quoting Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1978).[15] Since there has been no "exceptional showing of error," the judgment of the district court, affirmed by the Eighth Circuit Court of Appeals, should remain undisturbed.

Even beyond the two-court rule, the complex remedial situation here should make the Court hesitate to review the district court's fact findings concerning a change in the remedy, because changes in equitable remedies are frequently necessary if remedial goals are to be achieved. *See United States v. Montgomery County Board of Education*, 395 U.S. 225, 234-35 (1969) (in school desegregation cases, remedial orders that are inflexible and rigid are "troublesome"). As this Court has long taught, "[i]n fashioning and effectuating [such] decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." *Milliken v. Brad-*

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[15] *See also, e.g., Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 317-18 n.5 (1985) (noting "reluctance to disturb findings of fact concurred in by two lower courts"); *NCAA v. Board of Regents*, 468 U.S. 85, 98 n.15 (1984) (Court accords "great weight to a finding of fact which has been made by a district court and approved by a court of appeals"); *Rogers v. Lodge*, 458 U.S. 613, 623 (1982) (same).

ley, 433 U.S. 267, 288 (1977), *quoting Brown v. Board of Education*, 349 U.S. 294, 300 (1955).[16]

The wisdom of these admonitions is illustrated here. The State petitioners never challenged as clearly erroneous the fact finding on which these budget increases were based. While they contested in the district court some of the facts KCMSD and the Jenkins plaintiffs presented, their own expert architect acknowledged at the evidentiary hearing on the Central High School budget that certain costs were not included in the original construction estimate that were essential for completion of the project. J.A. 1146-49; J.A. 1151. While the State complained generally in objecting to the use of the AHERA standard for asbestos abatement that not all of the abatement was necessitated by the disruption of asbestos due to demolition and renovation required elsewhere in the desegregation plan, it failed to produce any evidence identifying any particular portion of the abatement that was unrelated to that disruption and the need to make schools sufficiently safe and healthy to conduct successful educational programs that will draw a desegregated enrollment.

The State petitioners' attacks on the use of AHERA standards for asbestos abatement make clear how far its argument has strayed from the record and logic of the courts below. At the same time that the State petitioners

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[16] *Accord, Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15 (1971) ("breadth and *flexibility* are inherent in equitable remedies") (emphasis added). The lower federal courts, in considering modifications in desegregation decrees, repeatedly have recognized that the district courts are in the best position to assess the appropriateness of changes in the remedy. *See, e.g., Booker v. Special School Dist.*, 585 F.2d 37, 353 (8th Cir. 1978), *cert. denied*, 443 U.S. 915 (1979) ("the basic responsibility for determining whether . . . and to what extent [a desegregation injunction] should be modified rests primarily on the shoulders of the district court that issued the injunction in the first place"); *Mapp v. Bd. of Educ.*, 477 F.2d 851, 852 (6th Cir.), *cert. denied*, 414 U.S. 1022 (1973) ("[a]ppropriate relief required by changed conditions is a matter for presentation to and consideration by the District Court").

criticize the courts below for supposedly adopting as the guideline for the remedy the "virtually limitless" standard of attractiveness to additional non-minority students, they fault those courts for adopting the AHERA regulatory standards for asbestos abatement work. Far from being limitless, the AHERA standards add an objective level of precision to the remedy, so that the school district can measure not whether it has done all of the asbestos abatement it would *like* to do, or that it would be *attractive* to do, but that it *must* do under federal law because it is disrupting asbestos in the course of other work required by the court-ordered plan.

The State's AHERA argument is as illogical as would be a complaint that electrical work performed in the course of the desegregation capital improvements was being done in accordance with the standard required by the city's building code. When the court orders that the constitutional violations that caused the district's schools to "rot[]" be remedied by building a new school or addition, or by upgrading wiring to provide the lighting needed for an adequate educational environment, that work must, of course, meet the applicable building codes. That the work is "up to code" does not mean that the State is required as an obligation under the desegregation plan to bring the KCMSD schools' electrical systems up to the building code; the use of the building code as a measure is a function of the fact that electrical work is being done for other reasons. Indeed, the *reasons* for the work the State does not, and cannot, challenge, having acknowledged the same remedial proposals in its own capital improvements plan. The use of the building code, like the use of AHERA to measure the appropriate degree of asbestos abatement, is the kind of objective measure that the lower federal courts can and should rely on to lend some clarity and objectivity in the shaping of an equitable remedy. The illogical alternative apparently favored by the State petitioners is an order that the KCMSD abate asbestos disturbed as part of the constitutionally mandated desegregation plan capital improve-

ments to some lesser degree than is required by federal law, and by the health and safety needs of KCMSD schoolchildren.

Finally, the issues here are moot, and as a practical matter present no opportunity for the Court to change the course of the Central High School construction or asbestos abatement projects. The new Central High School is now completed. The school opened in September 1991, and whereas it was an all-minority school before it became a magnet, the student body for 1991-92 is 17.5 percent non-minority. This is significant progress, since the existing, all-minority classes of students were not required to leave when the school became a magnet school. The freshman class is 24 percent non-minority, so enhanced desegregation for Central is readily achievable.

Similarly, the $910,224 in additional absestos work for six schools, about which the State complains, has long been completed and paid for. In the desegregation capital improvements program generally, the vast majority of the work has been completed.

Litigants "must have suffered, or be threatened with, an actual injury traceable to the defendant and *likely to be redressed by a favorable judicial decision*" before this Court should exercise its discretionary jurisdiction. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, ——, 110 S. Ct. 1249, 1253 (1990) (emphasis added) (citations omitted).[17] A ruling by this Court would not change the fact that Central High School has been built in accordance with

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[17] This is true because Article III of the Constitution limits the federal courts to adjudicating "actual, ongoing controversies between litigants." *Deakins v. Monaghan*, 484 U.S. 193, 199 (1988). In addition, Article III "denies federal courts the power 'to decide questions that cannot affect the rights of litigants in the case before them,'" *Lewis v. Continental Bank Corp.*, 110 S. Ct. at 1253, *quoting North Carolina v. Rice*, 404 U.S. 244, 246 (1971), and further limits them to "resolving 'real and substantial controversies *admitting of specific relief* through a decree of a conclusive character." *Id.*, *also quoting Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227 (1937) (emphasis added).

the budget increase approved by the courts below, and the work at the schools subject to the asbestos abatement budget increase of $910,224 has been completed.[18]

Needless to say, these issues do not present any conflict among the circuits that requires resolution by this Court, nor do they present any important question of federal law. They concern the process of school building construction and estimating the costs of such construction. The fact findings at issue are backed by the testimony, in affidavits and at a hearing in the case of Central High School, of architects, construction managers and construction cost estimators. They should remain undisturbed by this Court.

II. EVEN IF THE PETITION PRESENTED THE ISSUE OF THE OVERALL SCOPE OF THE DESEGREGATION REMEDY IN KANSAS CITY, THE COURT SHOULD DECLINE REVIEW BECAUSE IT HAS PERMITTED THAT REMEDY TO GO FORWARD WHEN THE SCOPE ISSUE WAS PREVIOUSLY PRESENTED

Despite the fact that the questions presented by the State petitioners raise only the narrow and technical issues described in part I. above, petitioners invite the Court generally to "consider the scope of the ongoing school desegregation remedies" ordered for Kansas City. Pet. at 2.[19] That issue is not properly before the Court

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[18] The State petitioners likely will contend that these issues are not moot because this Court could rule that the State should not have to pay for the budget increases. Such a narrow question of payment allocation is hardly an issue, however, that warrants this Court's review.

[19] The State stresses repeatedly that the overall purported cost of the remedy is "*some $1.2 billion*" and that it "*has actually paid approximately $469 million*" toward the remedy. Pet. at 9 (emphasis in original). These numbers distort considerably what is at issue in the instant petition and the facts regarding the overall remedy. The actual construction cost increase approved for Central High School was $8,231,565, with a 10 percent contingency factor, and the actual cost increase for asbestos abatement at six schools was

because of the narrowness of the State's questions and the rulings actually made by the court of appeals on the two budget change decisions the State petitioners challenge. *See* Sup. Ct. R. 21.1(a) ("Only the questions set forth in the petition, or fairly included therein, will be considered by the Court"); *Berkemer v. McCarty*, 468 U.S. 420, 443 n.38 (1984).

Even if that decision and the questions presented could somehow be read to implicate larger issues about the scope of the remedy overall, the Court should decline review because it has permitted the remedy to go forward on two previous occasions when review of scope issues was requested by various parties.[20] In 1989, the

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$910,224, with future work likewise to meet the AHERA standards. Even if the petition properly raised issues concerning the overall scope of the remedy, the State's $1.2 billion figure apparently a) compresses about 10 years of capital improvement work and seven years of magnet school and desegregation program costs into one number, b) is based at least in part on maximum *budgeted* figures and not on the actual costs of the work, which have been ascertained on occasion to be lower, and c) includes all the costs paid by the KCMSD from locally generated funds.

[20] The State's rather dramatic recitation of what it characterizes as "the evolution of this expansive remedy" stresses the dollar amounts of each stage of the further development of the remedy, as if to suggest that the costs of the remedy will continue to escalate forever if not halted by this Court. Pet. at 5-10, 16-18, 20 ("the courts in this case have embarked on a remedy that is potentially endless in nature and scope"). In fact, the capital improvements ordered by the courts below are one-time projects to provide schools or to make existing schools suitable for desegregation programs. A very significant proportion of that work is already completed. With respect to the magnet school plan, the KCMSD has made a commitment to the district court that after the initial cycle of implementation and magnet school conversions ends at the conclusion of the 1991-92 school year, the cost will begin to drop because start-up equipment, supplies and training necessary to begin these programs will be in place. In short, there is no basis to believe that any party to this case, or the courts below, intend these decrees to operate "in perpetuity" in violation of this Court's teaching in *Board of Education of Oklahoma City Public Schools v. Dowell*, —— U.S. ——, ——, 111 S. Ct. 630, 637 (1991).

State petitioners sought review of the scope of the desegregation orders' Long-Range Magnet School Plan and capital improvements plan, arguing specifically, as they do in the instant petition, that a remedy based on the duty to attract additional non-minority students to a school district and to improve a school district to a level of comparability with surrounding districts is beyond the power of a federal court remedying an intradistrict constitutional violation. *Compare* Petition in Nos. 88-1150, *et al.* at i ("Whether a federal court, remedying an intradistdict [school segregation] violation . . . may a) impose a duty to attract additional nonminority students to a school district, and b) require improvements to make the district schools comparable to those in surrounding districts") *with* Petition at issue here, No. 91-324 at 18 ("By establishing as a primary remedial objective the goal of attracting additional nonminority enrollments to the school system, the lower courts in *Jenkins* have defined this intradistrict remedy in terms that exceed the constitutional mandate.").

On April 24, 1989, this Court declined to review the scope of the remedy issue presented by the State in Nos. 88-1150, *et al.* 490 U.S. 1034 (1989). Moreover, the Court also declined to review the original petitions for certiorari filed by KCMSD and the Jenkins plaintiffs in 1987, which argued that a mandatory interdistrict remedy was justified based on the record before the district court in the liability case. *See* 484 U.S. 816 (1987). The State bypassed the opportunity to cross-petition to challenge the basic structure of the original remedy, which called for educational programs, magnet schools, capital improvements, and desegregative voluntary interdistrict transfers.

The result has been that progress has continued in the implementation of the overall remedy right up to today. The 1991-92 school year, now underway, is the final year for conversion of schools to magnet schools under the first six-year cycle of the Long-Range Magnet School

Plan. Accordingly, all of the KCMSD high schools and middle schools have been converted to magnet schools, along with 35 elementary schools. This process has included training of existing staff and hiring of specialized staff in the magnet themes, the purchase of equipment and supplies to support the specialized programs that the themes require and, under the capital improvements plan, the construction or renovation of specialized facilities to accommodate specialized classes. Indeed, under the capital improvement plan, seven new school buildings are completed and already housing students in magnet school programs. Six more new school buildings are under construction and are scheduled for completion during the 1992-93 school year. Dozens of other school building renovation projects are completed or will be completed during the current school year.

Simply put, the courts below have been on the course of supervising the implementation of the remedy for over six years, during which this Court declined or was not asked to review challenges to the scope of that remedy. It would be extremely disruptive to the implementation, and no doubt could set the KCMSD on an even longer course toward unitary status, if the Court entertained now what at least some passages in the State's petition describe as a global review of the remedial standards and particular remedy components adopted by the courts below.[21]

In an effort to raise some question of federal law that might make these issues appear worthy of review

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[21] Needless to say, review of the overall remedy, after over six years of judicial proceedings and implementation, would raise many of the same questions described at pages 18-19 above concerning deference to the fact findings of the courts below. The remedial proceedings have been the subject of weeks of major hearings and several smaller hearings per year, involving expert as well as lay testimony on educational and construction issues. The parties have filed cabinets full of motions papers and exhibits during the remedial proceedings, and the district court has entered over 160 substantive orders.

by this Court, the State petitioners suggest that "[t]he grant of certiorari in this case would allow this Court to establish clearly that the permissible scope of a court-ordered desegregation remedy is to be determined by reference to the factors identified in *Green v. New Kent County School Board*, 391 U.S. 430 (1968) . . . ." Pet. at 16. Certainly no such clarification is needed. For over 20 years, the lower federal courts have been supervising the development and implementation of desegregation plans with reference to this Court's directives in *Green*, reiterated last Term in *Board of Education of Oklahoma City Public Schools v. Dowell*, —— U.S. ——, ——, 111 S. Ct. 630, 638 (1991). The district court here relied on *Green*, among other decisions of this Court, as the guideline for the overall structure of the remedy. 639 F. Supp. at 23. The State petitioners fail completely to explain how the Central High School and asbestos decisions run afoul of *Green*, since both bear directly on the "facilities" factor cited in *Green* as part of "every facet of school operations" that must be considered in formulating a desegregation remedy. *Green*, 391 U.S. at 435.

The State petitioners also ask the Court "to specify that the federal courts' mandate to determine whether the vestiges of *de jure* segregation had been eliminated 'as far as practicable,' *Dowell*, 111 S. Ct. at 638, is to be determined by those same *Green* factors." Pet. at 16 (footnote omitted). The Central and asbestos issues simply do not raise *Dowell* issues of when stable desegregation, to the extent practicable, can be said to have been achieved. No party in this case has made a request that the district court determine whether unitary status has been achieved in the KCMSD, and the State makes no representation that the KCMSD is unitary. Such a determination obviously is premature in the midst of implementation of this desegregation plan. Without a determination by the district court, after a hearing and through proper fact findings, as to whether all vestiges of segregation have been removed to the extent practi-

cable, there is no *Dowell* issue to be considered by this Court.

For the same reasons, the issues presented by this petition do not raise any question of whether some or all "largely-minority schools" can remain in a unitary school district. Pet. at 18. The petition does not define what a "largely-minority school" would be in Kansas City, and the courts below have not opined on whether it is practicable for all schools in the KCMSD to have desegregated enrollments, or whether some racially identifiable schools will be permitted to remain at the termination of the remedy. Indeed, no party has sought a ruling on that issue, which is unsurprising since it would be premature in the midst of implementation of the remedy, while desegregative gains are still being made, to determine whether some schools as a practical matter will remain racially identifiable. Certainly the question of whether racially identifiable schools will remain in the KCMSD is not implicated in issues of the proper budget for construction of Central High School and the proper amount of asbestos abatement to be done during desegregation capital improvements.

In fact, the issue of racially identifiable schools may never need to be reached, because as the KCMSD magnet schools come on line, they are slowly winning the desegregated enrollments that are the goal of the plan. In 1985, Judge Clark found that 19 of the 50 elementary schools had 90 percent or higher black enrollment, as did three of the eight junior high schools and three of the eight high schools. By the 1991-92 school year, 11 fewer schools were at that level: 9 fewer elementary schools and 2 fewer middle and high schools. In the 1991-92 school year, almost 1,700 new non-minority students, who previously had attended private or suburban schools, were attending school in the KCMSD. Of that number, over 900 were new to the KCMSD in the fall of 1991. A solid

foundation of desegregative progress and of remedying the harm to minority students has been laid.

There can be no doubt that such voluntary desegregation costs more to achieve than the type of mandatory busing that the State proposed and the district court rejected in 1985. Voluntary desegregation through magnet schools and parent choice, although it requires an investment to make the schools worth choosing, avoids the coercion and instability inherent in busing-only remedies. The district court here so found back in 1985. 639 F. Supp. at 35-36. For over six years it has been on a course of making a voluntary remedy work in a school district in a state of "decay" and declining educational achievement. As we are finally turning the corner on desegregative progress, that remedy should not be disturbed.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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